(26,091)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 624.

NEW ORLEANS & NORTHEASTERN RAILROAD COMPANY AND UNITED STATES FIDELITY & GUARANTY COMPANY, PLAINTIFFS IN ERROR,

vs.

JOE SCARLET.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

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1 In the Supreme Court of Mississippi, March Term, 1917.

At a regular term of the Supreme Court of Mississippi begun and held in the Court Room at the Capitol, in the City of Jackson, Mississippi, on the 1st Monday, being the 5th day of March, A. D. 1917, pr-sent and presiding Honorable Sydney Smith Chief Justice pr-sent also Honorable Sam C. Cook, Honorable J. Morgan Stevens, Hon. Eugene O. Sykes, Hon. J. B. Holden and Hon. Geo. H. Ethridge Associate Justices; Geo. C. Myers Clerk and C. L. Johnson, Marshal the following proceedings were had in the case of New Orleans & North Eastern Railroad Company vs. Joe Scarlet, 19342.

2 THE STATE OF MISSISSIPPI,
Clarke County:

Pleas and Proceedings Before the Circuit Court of Clarke County, State of Mississippi, at Regular March Term, 1916.

Be it remembered that a regular term of the Circuit Court of Clarke County, State of Mississippi, was begun and held at the Court House of said County in the Town of Quitman on the First Monday *of* the 6th day of March, 1916. That being the time and place designated by law for the holding of said Court.

Present the Hon. R. W. Heidelberg, Judge of the 10th Judicial District of Mississippi, thereon sole presiding.
Martin Miller. Esq., District Attorney for said District, John W. McNeal, Clerk of said Court, and Geo. W. Meadows, Sheriff of said County.

Said Court was opened according to Law when the following proceedings were had and done.

2½ 1703.

JOE SCARLET

vs.

NEW ORLEANS & NORTHEASTERN RAILROAD COMPANY.

Damage Suit.

Coming on to be heard among other things was the case of Joe Scarlet vs. N. O. & N. E. Railroad Co. when the following proceedings were had and done, to wit:

3 STATE OF MISSISSIPPI,
County of Clarke:

In the Circuit Court, March Term, 1916.

JOE SCARLET, Plaintiff,

vs.

NEW ORLEANS & NORTHEASTERN RAILROAD COMPANY.

Comes the Plaintiff Joe Scarlet a resident Citizen of the State of Mississippi and brings this his said suit against the New Orleans & Northeastern Railroad Company a corporation engaged in commerce between the States of the Union and operating a railroad from the City of New Orleans in the State of Louisiana through the State of Mississippi and having as its northern terminus the City of Meridian Lauderdale County Mississippi and having a railroad running into and through a portion of the County of Clarke and having an agent within said County of Clarke—

In an action on the case—

For that heretofore towit on and prior to the 14th day of September 1915 the Plaintiff was and had been engaged as a Locomotive fireman in the employ of the said defendant corporation and had been so engaged for about five years and had faithfully and honestly rendered faithful and earnest service unto his said Master the Defendant corporation during that length of time.

Plaintiff charges that prior to the 14th day of September 1915 he was an able bodied strong man and fully physically able to handle the work usually and ordinarily done by a fireman on one of the defendant's engines, which work made it necessary for the fireman on one of the trips of said engines to handle many tons of coal with which the defendant's said engines was fired and rendered it necessary for such fireman to remain constantly upon his feet down in the deck of the engine with one foot on the front end of the tender and the other in the deck of the engine opposite the fire box of said engine and in this position to do hard work in keeping coal supplied to the fire of said engine and in this position to handle large quantities of coal with a large shove- or scoop from the tender into said fire box.

4 Plaintiff charges that the engines of said defendant railroad company are coupled to the tanks of said engines with large iron chains and pins and bolts and that said couplints if safe and not broken or out of repair, and when handled properly and carefully will hold and keep connected the engines and tanks of said Locomotives.

Plaintiff charges that his position called for him to stand while firing said engines with one foot on the engine and one foot on the tender, that is to say, he is required to stand immediately over the said couplings between the engine and tank.

Plaintiff charges that on said 14th day of September 1915 he was

the servant of the defendant railroad corporation acting in the capacity of fireman on one of his master's trains plying between New Orleans Louisiana and Meridian Mississippi and said train on said date was engaged in Interstate Commerce between the States and was hauling freight from one State to another.

Plaintiff charges that the dut-es of said Master Railroad Corporation were than and there fixed by an Act of the Congress of the United States of America enacted for the protection of the life and limb of servants of Interstate Carriers and under which said Act of Congress the defendant railroad Company is made liable to its servant employed by it in Interstate Commerce for damages to any person suffering injury while he is employed by such carrier in such commerce for such injury resulting in whole or in part from the negligence of any of the officers, agents, or employes of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works or other equipment.

Plaintiff charges that on said 14th day of September 1915 he was engaged in firing the second engine of a double-header running out of New Orleans Louisiana known as engine 260 and that when said engine was leaving Talawa Mississippi on its northward journey that the front Engine of said Double Header operated by Engineer Moore gave a sudden hard and rough jerk and was rapidly hurled forward by said front engineer and in a negligent manner.

Plaintiff charges that the track of said Defendant Company at said point was and is so built that an engine moving forward in a northern direction has to be moved with a sudden and rough jerk by reason of the grade of said track.

Plaintiff charges that because of the negligent starting and jerking of the front engine in making a start from Talawa on said occasion and by reason of the negligence of the said engineer in charge thereof in starting said engine in a negligently rough and improper manner and by reason of the condition of the defendant's track at said point which had been built in a negligent manner so as to require an unnecessary force to start a train under such circumstances that said engine on which the Plaintiff was then and there working and putting in coal was rapidly, roughly and suddenly jerked.

Plaintiff charges that it was the duty of the defendant Master to so couple its engines as to make the usual and ordinary handling of its engines and trains impossible to pull apart or to break the chains and pins coupling the engine with the tank.

Plaintiff charges that this last duty the Defendant railroad Corporation failed to perform but on the contrary had equipped its engine with coupling devices, to-wit, chains and pins of defective and unsafe kinds and character.

Plaintiff charges that because of the several acts of negligence herein above set out and alleged that on the day and date aforesaid the Engine and Tender of the engine on which the Plaintiff was working and while he was in position of half way on the engine and half way on the tender and right over the couplings between the

engine and tender, was by reason of its being negligently handled by the engineer of the front engine and by reason of the defective and unsafe condition of the couplings and chains and pins between the engine on which the Plaintiff was at work and the tender attached thereto and by reason of the improper condition of the track of the Defendant roughly and negligently torn apart and the iron chains and couplings and pins and gearing between the engine and tender upon which the Plaintiff was at work were broken and torn and your Plaintiff was then and there thrown to the ground some seven feet and suffered painful and serious injury.

Plaintiff charges that he was hale and hearty prior to his said injury but that by reason thereof he has been made a cripple
6 for life and that his physical power is completely gone so that he is unable to life any sort of weight.

Plaintiff charges that he was seriously and permanently injured and hurt in the back, right hip and muscles in the back and that as a result thereof his backbone is out of line and the muscles and leaders in his back and hip are torn and bruised to such and extent as to totally disable him and cause him great physical and mental pain and anguish and that the negligence of the defendant has completely worked a permanent change in his physical ability and soundness from that of a hale and hearty and healthy man of — years of age to that of a man who will have to live the balance of his natural life as a cripple and unable to do any sort of labor out of which he could eke out an existence.

Plaintiff charges that his expectancy of life is that of — years.

Plaintiff charges that he was earning approximately One Hundred and Twenty-five Dollars a month at the time of his injury and had every reason to expect promotion at the hands of his said Master to some higher job as Engineer—and that by reason of his service of approximately five years as a fireman he was pretty close to promotion in point of time.

Because of the wrongs and injuries hereinabove set out and because of his total disability to perform the work of his master and because of his rights and remedies hereinabove set out and because of the failure and refusal of the defendant Corporation to respond to the demands of the liabilities fixed by the Act of Congress hereinabove referred to the Plaintiff brings this his suit and demands judgment against the Defendant in the sum of Twenty-five Thousand Dollars together with court costs.

FEWELL & CAMERON,
Attorneys for Plaintiff.

7–8 No. 1703.

JOE SCARLET

v.

NEW ORLEANS & NORTHEASTERN RAILROAD COMPANY.

And the Defendant by its attorneys comes and defends the wrong and injury, when, etc., and says that it is not guilty of the said

supposed grievances above laid to its charge, or any or either of them or any part thereof, in manner and form as the plaintiff hath above complained against it. And of this it puts itself upon the country.

B. F. CAMERON, JR.,
A. S. BOZEMAN,
Attorneys for Defendant.

Filed March 6th, 1916. John W. McNeal, Circuit Clerk.

9 JOE SCARLET

v.

NEW ORLEANS & NORTHEASTERN RAILROAD CO.

Notice Under General Issue.

And the Plaintiff will take notice that the defendant will offer in evidence and prove, under the general issue, in bar of said action, that the plaintiff had actual notice of, and well knew, the size and capacity of the engine upon which he was working and the nature and condition of the couplings between the said engine and the tender or tank, and knew that the said engine was then and there being used as a second engine pulling a long and heavy train, commonly known as a double header, and well knew that the said double header train, in leaving the station of Talawa, was going up a heavy grade and that the strain upon said couplers between the said engine and tank would then and there be greater than usual, and the defendant, in placing himself in a position to fall between the said engine and tank, in case the said couplers gave away or were pulled in two, assumed the risk incident thereto, and is not, therefore, entitled to maintain the said action.

2. And the defendant will further offer in evidence and prove, under said general issue, that in placing himself in a position to fall between the said engine and tank under the facts and circumstances hereinabove stated, the plaintiff was guilty of negligence which proximately contributed to and caused his own injury.

A. S. BOZEMAN,
BEN F. CAMERON, JR.,
Attorneys for Defendant.

Filed March 20, 1916. John W. McNeal, Clerk.

Issue in Short joined by consent.

FEWELL & CAMERON, *Attys.*

10 No. 1703.

JOE SCARLET

v.

NEW ORLEANS & NORTHEASTERN RAILROAD CO.

Comes the Defendant, by its Attorneys and moves the Court to require the Plaintiff to give security for all costs accrued and to accrue in this suit.

A. S. BOZEMAN &
BEN F. CAMERON, JR.,
Attorneys for Defendant.

STATE OF MISSISSIPPI,
Clarke Count-:

Personally appeared before me, the undersigned, Clerk of the Circuit Court of said County, Ben F. Cameron, Jr., Attorney for the Defendant, who, being duly sworn, says upon information which he believes to be true, that the Plaintiff in the above case has not, as affiant believes, sufficient property in this State, out of which the costs can be made, if adjudged against him, and that Defendant, has, as affiant believes, a meritorious defense, and that this affidavit is not made for delay.

BEN F. CAMERON, JR.,
Attorney for Defendant.

Sworn to and subscribed before me, this 6th day of March A. D. 1916.

[SEAL.] JOHN W. McNEAL,
Circuit Clerk.

Filed March 6, 1916. John W. McNeal, Clerk.

M. D. "B" p. 257-8.

A. S. Bozeman & Ben F. Cameron, Jr., Attorneys for Defendant.

10½ No. 1703.

JOE SCARLET

v.

NEW ORLEANS & NORTHEASTERN RAILROAD CO.

To Fred Donnelly, Court Stenographer:

The defendant desires to appeal to the Supreme Court of Mississippi from the judgment in favor of plaintiff against the defend-

ant rendered by the Circuit Court of Clarke County, on, to-wit, March 21st, 1916, a day of the March Term of said Court, and this is to notify and request you to transcribe and file the stenographer's notes of the evidence and proceedings in this case within the time required by the statute, and to do such other things with reference thereto as the statute requires.

A. S. BOZEMAN &
BEN F. CAMERON, JR.,
Attorneys for Defendant.

I acknowledge receipt of a copy of the foregoing notice this 27th day of March, 1916.

F. A. DONNELLY, JR.,
Official Court Stenographer.

Filed March 30th, 1916. John W. Neal, Circuit Clerk.

11 STATE OF MISSISSIPPI,
County of Clarke:

In the Circuit Court, March Term, 1916.

No. 1703.

JOE SCARLET (White), Plaintiff,

v.

NEW ORLEANS & NORTHEASTERN RAILROAD CO., Defendant.

Appearances:

Messrs. Fewell & Cameron, Attorneys for the Plaintiff.
Messrs. Bozeman & Cameron, Attorneys for the Defendant.

Be it remembered, That, on to-wit, the 21st day of March, A. D., 1916, the same being one of the regular days of the March 1916 term of Circuit Court of Clarke County, Mississippi, this cause came on for hearing before the Hon. R. W. Heidelberg, Judge of said Court, presiding, and a jury having been empanelled, the following among other proceedings were had and entered of record, to-wit:

The plaintiff, to sustain the allegations of the declaration made admissions and introduced evidence as follows, to-wit:

12 Mr. JOE SCARLET (the Plaintiff), being first duly sworn was produced and testified as follows, towit:

Direct examination.

By Mr. Fewell:

Q. Your name is Joe Scarlet?
A. Yes, sir.

Q. What is your age?
A. I was born in 1882.
Q. How long were you employed by the New Orleans & Northeastern Railroad Company?
A. September, 1910.
Q. Since 1910?
A. Yes, sir.
Q. In what department were you employed?
A. I was fireman.
Q. Fireman on their locomotive?
A. Yes, sir.
Q. What did you do before you went to work for the New Orleans & Northeastern?
A. I fired four years in the navy.
Q. Fired four years in the navy?
A. Yes, sir.
Q. In what navy.
A. United States Navy, I have a discharge from them right here.

(Witness produces paper.)

Q. This is your discharge from the——

Mr. Bozeman: We object to any evidence about any discharge from the navy.
The Court: I sustain the objection.

To which action and ruling on the part of the Court the Plaintiff then and there excepted.

Q. You say prior to your entering the service of the New Orleans & Northeastern you were fireman four years for the United States Navy?
A. Yes, sir.
Q. And when you quit the navy you went to work for the New Orleans & Northeastern Railroad?
13 A. Yes, sir.
Q. I believe you stated you went to firing?
A. Yes, sir.
A. And that was in 1910?
A. September.
Q. How often would you make a trip as fireman for the Northeastern?
A. Oh, every day, sometimes maybe skip a day but not over a day, been making every day now——
Q. How much coal would a locomotive of the New Orleans & Northeastern use ordinarily on a trip from Meridian to the Terminals?
A. Well, different engines, you know burn so much; some engines burn more and some engines burn less.
Q. Well, give the jury some idea about how much coal you have to handle?

A. Six, seven to nine tons from Picayune to Meridian and from New Orleans to Meridian about ten tons.

Q. While the train was running where would be the position of the fireman?

A. Well, I was standing on the deck.

Q. Explain to the jury what the deck of the engine is?

A. Why it is the engine tender this way and drawbar this way and there is an apron over the drawbar and the fireman is supposed to stand one leg on tender and other leg on the apron.

Q. Now, standing in that position, what was there, if anything, between the fireman and link pin and chain that connected——

A. Safety chain and drawbar.

Q. What was there between the fireman and safety chain and drawbar, what do you stand on?

A. On the apron.

Q. Is that iron or wood or what?

A. It is made of iron.

Q. We-l, does that cover the entire space in there between the engine and tender?

A. It does; yes, sir.

14 Q. Is that a solid piece of iron?

A. Yes, sir.

Mr. Bozeman: I object to these questions and submit that the witness ought to just describe it.

The Court: Don't lead the witness.

Q. Is the piece of iron solid or has it got holes in it?

A. It is solid.

Q. Can you see through that piece of iron?

A. No, sir.

Q. Now, Mr. Scarlet, you have complained of an injury occurring to you at or near Tallawa last year, what day was it?

A. September fourteenth, at one o'clock at night.

Q. Were you employed in the passenger service or freight service?

A. I was in the freight service during the time, double header.

Q. Which direction was the train coming?

A. North.

Q. What did the train consist of?

A. Freight; interstate freight; freight.

Q. How many cars approximately did you have?

A. I am most sure we had over thirty-five.

Q. You think you had over thirty-five?

A. Yes, sir.

Q. Was there just one engine or two engines?

A. Two engines.

Q. How did you call this train, was it an extra or regular train?

A. Extra 253.

Q. Extra 253?

A. Yes, sir.

Q. How did they number these extras, according to the number of the engines?

Mr. Bozeman: We object to these questions as being leading questions. He just puts in the mouth of the witness the answer that he makes.

The Court: Objection sustained. Don't lead the witness.

Q. Was there one or two engines on this train at that time?
A. Two engines.
Q. Who was operating the front locomotive?
A. The front engine?
Q. Yes, sir.
A. Truehart Moore.
Q. What position did he occupy?
A. First engine.
Q. What did he do about the first engine?
A. Engineer.
Q. Who was fireman?
A. Negro by the name of Edmonds.
Q. Well, who was engineer of the second engine?
A. Jim Smith.
Q. Who was fireman of the second engine?
A. I was.
Q. Where did you catch the train, you and your engineer?
A. Picayune.
Q. Picayune, Mississippi?
A. Yes, sir.
Q. Were you on the front or second engine?
A. I was on the second engine.
Q. And your engine was number what?
A. 260.
Q. Do you know what the ordinary capacity for one of the 260 class engines is in the way of freight?
A. It is 950 tons.
A. 950 tons?
A. Yes, sir.
Q. Do you know how much they had on this double header on this occasion?
A. I couldn't tell you the tonnage, but I am most sure they had over thirty-five, probably thirty-seven, I was not sure.
Q. Thirty-five to thirty-seven what?
A. Car-; I couldn't tell you the tonnage.
Q. Your conductor is here, isn't he?
A. Yes, sir.
Q. Well, did you stop at Tallawa on that occasion?
A. We did.
Q. Explain to the jury the physical condition at Tallawa with respect to the track, whether it was on grade, at grade, up grade or down grade?
A. Well, we headed in side track for another train and the other train came while we was there and I was putting in the fire while they were pulling in front and I dropped to the ground; I dropped and hit my head on the drawbar and came right on to the tank and

they was beating on me and I crawled from under to get away all I could.

Q. Now, did your accident happen just as the train started or had it——

A. Just as the train started.

Q. Just as the train started?

A. Yes, sir.

Q. What did you say happened at your engine and tender?

A. King pin and safety chain broke.

Q. Now, when the king pins and safety chains broke, tell the jury whether or not the engine of your *engine* separated from the tank of your engine?

A. Certainly.

Q. Did it leave the tank of your engine?

A. The engines went away ten to fifteen feet from the tender.

Q. Now, what was your position at the time that the engine and tank tore apart?

A. I was in fireman position, one foot on tender and other on the engine and shove*d* in my hand, and dropped and cut my hip on the drawbar and came on the ground, my back was up and the air hose was beating on me. You se-, I was under the tank.

Q. Well, what efforts did you make to get out of the way of the tank?

A. I just crawled out.

Q. Now, where were you standing at the time that the engine and tender pulled apart with reference to this apron that was in there for the fireman to walk on?

A. I had one foot on the tank and the other on the apron.

Q. Where was this apron?

A. It was between the tender and tank.

17 Q. With your other foot on the apron?

A. Yes, sir, just in firing position.

Q. Where did you catch this engine? Did you go out of Meridian with that engine on a former trip?

A. Yes, sir, the day before the accident.

Q. Did you leave Meridian on double header coming south?

A. Yes, sir, we did.

Q. Were the same two engines coming south on the trip before that were used coming back when you were hurt?

A. Yes, sir.

Q. Were they coupled the same way as to who was first or second?

A. Yes, sir, same way.

Q. Do you know whose engine, the engine that you were on, who usually operates that engine as engineer?

A. R. Stroble.

Q. Was he on that engine that night?

A. No, sir, he was not on it.

Q. Mr. Jim Smith I believe you stated was engineer?

A. Yes, sir.

Q. Now, explain fully to the jury when you fell in between the tank and engine where you were struck on your body.

A. Well, when I fell I cut my right hip on the drawbar.
Q. Now, you say your right hip?
A. Right here. (Indicating.)
Q. You mean front of the right hip?
A. Right here in front, yes, sir.
Q. Right under the watch pocket?
A. Yes, sir, right there and then I came to the ground this way.
Q. Do you know what part of the engine struck you in there by your watch pocket?
A. I think it is the drawbar because there is nothing else that could have struck me, because the drawbar is like this and comes out little off the apron.
Q. Now, when you struck whatever it was with your groin there you then fell to the ground, you say?
A. Yes, sir, and I cut my hip and came flat on my stomach and the air hose beating on me.
18 Q. You said awhile ago something about being hurt in the back?
A. Yes.
Q. Do you know what hit you in the back?
A. It must have been one of those air hose. They have got three. When the air uncouples——
Q. When the air uncouples the barrel of the air hose——
A. Yes, sir.

Mr. Bozeman: We object to counsel explaining what the witness testifies to.
The Court: Don't lead the witness.

Q. Now, what did you say happened to those air hose when the engine pulled apart?
A. Why, it was moving this way.
Q. When you say it was moving this way the stenographer don't get what that means, now tell the jury what you mean.
A. They would be jumping up and down this way.
Q. What size air hose are between the engine and tank.
A. It is about two inches round, made out of rubber and right on the end they have got iron couplers.
Q. Well, can you give the jury some idea about the weight of those iron pieces on the end of the air hose?
A. About three to four pounds, that is giving a light guess.
Q. After you struck the ground, what did you do?
A. After I laid there awhile then I crawled from under and went right on the other side of the train and laid down there.
Q. Well, were you hurt or what was the trouble with you?
A. Yes, sir.
Q. Where were you hurt?
A. In the right hip and in the muscles of the back and in the back, and I can't stoop down right now.
Q. Before you were injured tell the jury whether or not you were a sound, able-bodied man?
A. I sure was.

Q. Tell the jury what your capacity was to fire locomotives before you got hurt?

A. I never paid any attention. I used to get to Picayune and never sleep for two or three hours and come right back on
19 my run.

—. Tell the jury whether or not you were able to satisfactorily perform these duties satisfactorily to the engineer before the injury.

A. Oh, yes, I done my work.

Q. Are you able to fire an engine now?

A. No, sir.

Q. Why?

A. Because I am unable to go back in the service and that marine doctor told me not to go.

Mr. Bozeman: We object and move to exclude.

Q. Without telling what the marine doctor told you, or marine surgeon or anybody else told you why can't you fire an engine now?

A. Because I am not able, I can't stoop down and handle a scoop. It takes a strong back to do it and I ain't got no more strong back.

Q. Have you had any other doctor treating you?

A. Yes, sir.

Q. What other doctors have examined you and treated you?

A. I had Doctor Smith.

Q. Did you have an X-ray photograph taken by a physician?

A. Yes, sir.

Q. Going back a little bit, what did they do with you, Mr. Scarlet, after you went out and laid down side of the track?

A. Well, the conductor and flagman picked me up and put me in the caboose. They asked me if I could walk and I told them, "I don't know, if you help me I might could walk."

Q. Well, did they help you?

A. Yes, sir, and they put me in the caboose and I laid down on the cushion.

Q. Then where did they take you?

A. Took me to the hospital in Hattiesburg.

Q. Who treated you down there?

A. Why Doctor Bufkin.

Q. Who is Doctor Buskin?

A. The railroad doctor.

Q. How long did you stay there?

A. From Tuesday morning until Sunday morning.
20 Q. Then what did you do?

A. Just laid in bed, that is all I did.

Q. Did you lay in bed at Hattiesburg or go to Meridian.

A. I went to Meridian after I left the hospital.

Q. You left the hospital when?

A. Sunday.

Q. How did you get to Meridian?

A. I got me a hack from the hospital, I ordered a hack and rode to the depot and then I caught number four and I got me a taxi-cab?

Q. Where?

A. From the depot at Meridian to my house.
Q. Well, why did you get you a taxi?
A. Because I was unable to walk.
Q. After you got to Meridian and got to your home what did you do?
A. I went straight to bed.
Q. How long did you stay in bed, Mr. Scarlet, from your injury?
A. Let's see, it was on Sunday and I stayed in bed until Thursday morning.
Q. Of the next week?
A. Yes, sir.
Q. Tel- the jury whether or not you suffered any pain during all of that time.
A. I have suffered.
Q. Tell the jury whether or not you have suffered since that time you got out of bed.
A. I have suffered all the time since I got out of bed.
Q. Well, what is the character of your suffering, where do you hurt if anywhere?
A. Right hip and muscles of the back and in the back right here.
Q. What sort of pain, is it light or severe?
A. Sometimes it is light and sometimes pretty hard. When I get up in the morning and do anything, just move a chair, I feel awful bad.
Q. What do you have to do, if anything, to lace your shoes?
A. I have to do it just like this, like an old man.
Q. Why do you have to hold your foot on your knee?
A. Because I can't stoop down. I feel a pain in here when
21 I stoop down.
Q. When you say "in here," where do you mean?
A. Right in the back.
Q. What about your ability to rest comfortably at night?
A. I can't do it at all.
Q. What were you earning approximately from the railroad company as fireman?
A. From a hundred and twenty-five to thirty, sometimes thirty-five and I made as high as thirty-eight.
Q. You mean a hundred and——
A. Yes, sir.
Q. Hundred and thirty-eight what?
A. Dollars.
Q. Do you mean by the year, month, week or what?
A. By the month.
Q. Does that indicate anything about whether you made regular time or irregular time?
A. Just regular time.
Q. Now, I believe you stated you were injured September what?
A. Fourteenth.
Q. 1915?
A. Yes, sir.
Q. Did you give me your age when we started?

A. Yes, sir, 1882, April 16th.
Q. Do you know Dr. Rush?
A. I do, yes, sir.
Q. What if anything, did Dr. Rush have to do with your condition?
A. Took an X-ray photograph.
Q. Is that all he did, just took a picture for you?
A. Yes, sir, that is all.
Q. Do you know Dr. Shipp?
A. Yes, sir, I met him once.
Q. Did he examine you?
A. He did.
Q. Do you know Dr. Smith?
A. I do.
22 Q. Did he examine you?
A. He examined and treated me for three weeks and a half and he gave me up.
Q. Now, after you got back to Meridian, who waited on you?
A. He did.
Q. Which one?
A. Dr. Rey*h*olds, the railroad doctor.
Q. Does he serve this railroad?
A. Yes, sir.
Q. That we are suing?
A. (No answer.)
Q. How long did he treat you?
A. He treated me for forty-one days.
Q. Well, during that time tell the court and jury whether or not you suffered from your injuries?
A. I did, I suffered all times and first day I went home he came to my room where I was in the bed and I turned around and told him, "Now, Doctor, I am rooming here——

Mr. Bozeman: Wait a minute.

Q. Don't tell what you told him. Do you know anything about the condition of those safety chains and link pins between the engine and tank, did you have anything to do with their condition?
A. No, sir, according to the book of rules I have not got anything to do with them; that is not the fireman's duty.
Q. You say that is not the fireman's duty?
A. No, sir.
Q. Have you got a book of rules in your pocket?
A. I have.
Q. Whose duty is it to see that the locomotives of the railroad company are properly equipped?
A. They are supposed to be inspected every trip.
Q. Turn to the rule in that book that refers to that, please sir. (Handing witness book in which he indicates.)
Q. That is rule number what?
A. 279.
Q. Now, this book of rules,—where did you get this?

A. I got it from the main office.
23 Q. Of what?
A. Of the Northeastern Railroad.
Q. Who gave it to you, Mr. Scarlet?
A. Superintendent Flanagan.
Q. You said this was what?
A. Book of rules.
Q. When did you get it?
A. I got that in 1911, I don't remember, but it was in 1911, I know.
Q. Well, do you remember whether it was about the time you started to work or not?
A. Oh, it was just a little after.
Q. I will ask you whether or not this book of rules that you have handed me is the book of rules of this defendant company and in force at the time that you were injured?
A. Yes, sir.

Mr. Fewell: We offer this rule, if Your Honor please, 278 and 279, under the department "Master Mechanic."
The Court: Very well.

The book was then and there identified by the stenographer as Exhibit A and Mr. Fewell read from the book as follows:
"278. Page 52 of the rules of the defendant reading as follows: "They are responsible for sending out engines and cars in proper condition for service and must see that they are supplied with the necessary equipment."
"279. They must see that the engines are inspected at the end of each trip, that the necessary repairs are made and that they are properly cleaned."

Q. Now, Mr. Scarlet, did you have anything to do, was it any part of your duty to inspect safety chains and links of the engines you were to run?
A. No, sir.
Q. For fear the jury might not understand, explain to the jury what is between the engine and tank of this class of engine that holds them together.
A. There is a safety chain about four or five feet long, one
24 on each side.
Q. One on each side of what?
A. One on each side of the coupler and then there is that drawbar that I fell and hit my hip on and right at the end of the drawbar is a hole two and a half inches wide and eight inches long.
Q. The king pin is what size?
A. Two and a half inches round and twenty-eight inches long.
Q. Are they coupled so as to uncouple or stationary?
A. No, they are not coupled, they have got a hole in the drawbar and the -in goes right in and the head of the pin comes out on the tender.
Q. Does the engine tender couple automatically?

A. No, it slips right in, many times it slips, I have seen lots of times, some days the pin slips out and we have to put them back.

Q. Now, give the jury some idea about the size of those chains.

A. Now, I think, I am not positive, but I think that they are an inch and a quarter wide, I don't know what you call them, and about four or five feet long; I am not sure, but just give a light guess.

Q. Inch and a quarter in circumference?

A. Yes, sir.

Q. And they are how long?

A. Four to five feet.

Q. And how many are there?

A. There is two.

Q. Where are they situated?

A. One on each side.

Q. Each side of the coupler?

A. Each side of the coupler.

Q. When your train started from Tallawa how was it started with reference to easy or sudden jerk or how?

A. Well, I couldn't remember; all I remember is that these two engines parted away from there and they went away from ten to fifteen feet and I dropped to the ground. I don't remember whether it was a jerk or straight pull or nothing.

25 Q. The front engine and your engine left—do you know how far?

A. About—from ten to fifteen feet.

Q. That was about one o'clock in the morning, you say?

A. Yes, sir.

Q. Mr. Scarlet, what were you doing at the very moment that your engine tank parted?

A. Putting in the fire.

Q. Well, what did you have to put the fire in with?

A. With a shovel.

Q. Where did you get that coal from?

A. From the tank.

Q. Now, what position was the tank with reference to your position at the time you were throwing in this fire?

A. Straight, I reckon.

Q. Well, was it to your right or left?

A. It was to my right.

Q. Now, I believe you stated you were just in the——

A. Giving a swing to take the coal up, just about had it in the fire.

Q. Did you ever get that scoop of coal into the fire?

A. No, sir.

Q. Well, why didn't you get it in there?

A. Because I went to the ground.

Q. Now, what about the grade of this track this railroad company had at Tallawa where you stopped and undertook to start off?

A. Just a little hill.

Q. Is it up grade or down grade this way?

A. Up grade going north,—very little you can hardly notice.
Q. What effect does that have on pulling of the engine?
A. That might have saved me from getting killed.
Q. Let me understand you about that?
A. I say that little hill just saved me from getting killed because maybe those trains would have run two or three feet.
Q. The fact that this track was on a grade there had the effect, as you state, of keeping the train from rolling on to you, is that the idea?
A. Yes, sir, just starting you know.
26 Mr. Cameron: That is where you were injured, was it, Tallawa?
A. Tallawa, Miss.
Q. Tallawa, Mississippi?
A. Yes.

Cross-examination.

By Mr. Bozeman:

Q. Tallawa is south of Hattiesburg, isn't it?
A. Yes, sir, it is a hundred and fifteen miles from Meridian.
Q. That would put it how far south of Hattiesburg?
A. Let's see, eighty-five miles from Meridian to Hattiesburg, about nine miles, I guess, isn't it?
Q. About how much?
A. About fifteen or sixteen miles from Hattiesburg, I am not sure.
Q. Then you were coming north?
A. We were, yes, sir.
Q. And the hospital at Hattiesburg was the first hospital available after you got here?
A. Yes, sir.
Q. And they brought you to Hattiesburg in the caboose and sent you to the hospital there?
A. Yes, sir, the ambulance was waiting for me there.
Q. And when you got there, Dr. Bufkin, who you say was the railroad doctor, was there and examined you?
A. Yes, sir, he examined me in the hospital.
Q. And treated you?
A. Yes, sir.
Q. And that was what day of the week?
A. Tuesday, September fourteenth.
Q. And you stayed there until Sunday?
A. Yes, sir.
Q. Dr. Bufkin saw you every day during that time?
A. No, sir.
Q. How often did he see you?
A. He only saw me twice.
Q. First time?
A. No, sir, altogether three times, that night when he

27 looked at me and he came next morning and asked where I lived; I told him I have not got any home, I want to go to where my home is and go to Meridian and he said all right.

Q. When did he come again?

A. He came two days after and he asked me how I felt and I said, "Just the same," and he said, "All right, you can stay here," and of course Sunday come and I told him I was going to Meridian, and one of the nurses rang him up and asked him if it was all right. Before leaving the hospital he told me, "If you leave here, you will have to get a hack."

Q. Isn't it a fact that you walked from the infirmary to the depot when you went off that Sunday?

A. No, indeed, I did not.

Q. You did not?

A. No, sir.

Q. When you came in there that night Dr. Bufkin examined your injuries?

A. He did.

Q. And he treated and examined you?

A. Yes, sir.

Q. What treatment did he give?

A. The only treatment he did, just told the nurses to put me to bed and wash me and he said he would look at me in the morning.

Q. Did he give you any applications or liniment or anything of that kind?

A. No, sir, only thing he done for me one of the nurses done it. About three days after they asked me if my kidneys was working and I told him no and they got a rubber bag and laid it on my stomach and they gave me some salt and——

Q. He didn't put any application on you of liniment or anything of that sort?

A. No, sir.

Q. Your hands and knees were bruised up a little where you fell?

A. No, sir.

Q. Not bruised at all?

A. No, sir.

Q. He didn't do anything for that?

28 A. No, sir.

Q. Did he give any treatment at all for your back?

A. No, sir.

Q. Never bandaged you at all or put any application on your back?

A. No.

Q. Of course, you couldn't see your own back and don't know whether it was bruised or not?

A. No, but I could have felt it.

Q. Then you came to Meridian Sunday?

A. Yes, sir.

Q. Who was the first doctor that saw you after you got to Meridian?

A. Why the next day I rang for Dr. Reynolds and to come to my house and he came down and found me in the bed.

Q. Who did you board with there?

A. I boarded with Mrs. Smith, that is, I roomed there, and I ate my meals at Mrs. Martin's.

Q. You ate your meals with Mr. Martin at his house?

A. Yes, sir.

Q. How far is that from Mrs. Smith's?

A. About three blocks and a half, something like that.

Q. Now, Dr. Reynolds examined you too, didn't he?

A. Yes, sir.

Q. And how long was it that he treated you?

A. He treated me for forty-one days.

Q. Did he come to see you every day?

A. No, sir, he only come to see me once, and I said, "Doctor, I am only rooming here, I don't eat my meals here, I eat with Mr. Martin," and he said, "Get a stick and when dinner comes if you feel like walking, just walk to dinner." So I would walk, but didn't go to dinner for three or four days.

Q. After three or four days you did walk to and from your dinner?

A. Yes, sir, with a stick.

Q. And how long were you in bed after you got to Meridian before you went to your dinner, two or three days, you say?

A. From Sunday to Thursday.

Q. Now, from Thursday on you have not been confined to your bed at all?

29 A. No, sir.

Q. Been up and around and walking about?

A. Yes.

Q. You don't walk with a stick now?

A. No, sir; no, I don't.

Q. Well, Scarlet, you went to Dr. Reynolds' office for treatment then from day to day?

A. Yes, sir.

Q. About how often would you go?

A. Every time he told me, he told me sometimes to go every three days and sometimes four.

Q. You say you went every three or four days?

A. Yes, sir.

Q. And during all that time he made examinations from time to time?

A. No, he never did examine me but once and that is the first time he come to my room.

Q. Well, did he give you any treatment at all?

A. Yes, sir, he just give me some liniment to rub on.

Q. Now, when was it that you first went to Dr. Smith?

A. Well, I don't remember exactly.

Q. Was it after Dr. Reynolds quit treating you?

A. Oh, a long time after, about fifteen or twenty days after.

Q. Now, at the end of the forty-one days you say that Dr. Reynolds treated you he discharged you, that is to say, he thought you were ready to go back to work?

A. Yes, he said, "I am going to discharge you and you can make a trip or two and it will do you good,—it was on Saturday—but I am not going to release the discharge paper until tomorrow, I am going to give you another day," and he said, "Don't report to work until Monday," and I said, "All right." I went to the roundhouse and told the foreman the doctor had discharged me, but I am not able to go to work.

Q. How long after that, was it, that you went to Dr. Smith?

A. About fifteen or twenty days.

Q. And Dr. Smith treated you how long?

A. He treated me for three weeks and half and told me to go to some osteopath.

30 Q. Dr. Haley?

A. No, sir. He told me to go to Dr. Farthing.

Q. Dr. Farthing is an osteopath?

A. Yes, sir.

Q. Well, you had taken osteopathic treatment before you got hurt?

A. I have once for my knee.

Q. You had rheumatism?

A. I don't know what you call it,—it must have been rheumatism if you say so.

Q. I am asking you if it is a fact that you had rheumatism pretty bad before you got hurt?

A. No, it was not pretty bad because I will tell you how I got that.

Q. You need not tell that.

A. I got it right on the engine before.

Q. Well, if you insist on telling it it is all right, but you got it anyhow?

A. Yes, sir, I got it on the engine.

Q. And Dr. Haley treated you for that, didn't she?

A. Yes, sir.

Q. Isn't it a fact that at the time Dr. Haley was treating you that you were in such bad shape you were going on crutches?

A. I only went once on crutches.

Q. You mean you didn't use crutches but one day?

A. One day, that is all.

Q. How long was that before you got hurt on the engine?

A. About twenty days before.

Q. Now, isn't it a fact that when you were coming down to go out on this trip on which you were hurt at Meridian that you were suffering pretty badly with rheumatism then?

A. No, I was not suffering at all, I was just limping a little.

Q. Isn't it a fact that you were pretty badly drawn over and stiffened up at that time with rheumatism in your back?

A. No, I didn't feel any pains in my back or hips at all.

Q. About twenty days before you were crippled it was so bad you were using crutches?

A. I was not but one day with crutches, I went over to Dr.
31 Haley and when I came out I just threw the crutches away and she saw me next morning and said, "Where is your crutches?" I said, "I don't need them."

Q. She is a good doctor then?

A. Yes, sir.

Q. How long did Dr. Haley treat you?

A. Oh, about six or seven days.

Q. Electrical treatment?

A. Yes, sir, on my knee.

Q. Well, that rheumatism you had there stiffened you up generally, didn't it?

A. No, it didn't.

Q. How long were you off out there on your fireman's trip on account of your rheumatism just before this accident?

A. About fifteen or twenty days.

Q. Had you ever had any ailments like that before?

A. Never did in my life.

Q. That is the first time you were ever crippled by rheumatism?

A. Yes, sir.

Q. Now, when you came down to make this trip on which you were injured you say you were on a round trip from Meridian to Picayune and return?

A. No, we just went to Picayune and got our rest, eight hours rest, and then proceeded again north.

Q. Well, you were running between Meridian and Picayune?

A. Yes, sir.

Q. What engineer did you go down with?

A. My engineer was Jim Smith.

Q. He was your regular engineer?

A. No, sir, he was an extra engineer.

Q. Well, did you have any regular engineer to work with?

A. I did.

Q. Who was that?

A. Roy Stroble.

Q. How long had you been firing this engine 260 before you got hurt?

A. Let's see, pretty near four months.

32 Q. And when you went down on the trip from Meridian to Picayune Mr. Smith was your engineer?

A. Yes, sir, because my regular engineer laid off.

Q. And you went down on a double header?

A. On double header, yes, sir.

Q. On these same two engines?

A. Yes, sir.

Q. 260 and what was the other?

A. 253.

Q. The front engine being 263?

A. Yes, sir.

Q. Who was your engineer going down on 253?

A. Truehaft Moore.

Q. The same two engineers went down and came back?
A. Yes, sir.
Q. And the 260 had been running in double header for sometime before this?
A. Yes, sir, and she was always in the lead.
Q. Until this last trip?
A. No, sometime she used to be the second engine, but she belongs in the lead, that is, when I had my regular engineer.
Q. Well, the lead in the double header is fixed by the seniority of the engineer?
A. Just exactly.
Q. It is not which engine should go in front, it is determined by the fact that the oldest engineer goes in front?
A. He has the preference, yes, sir.
Q. Now, what did you say about the capacity of the 260?
A. It is 950, that is, single engine.
Q. What do you mean by that?
A. 950 tons.
Q. That her capacity is to pull 950 tons, how do you know that?
A. Because we have pulled it so much I heard the engineers and sometimes seen the conductors figuring up the tonnage.
Q. You mean by that that you had seen her pull 950 tons?
A. Sir?
33 Q. You mean by her capacity that you had seen her pull 950 tons?
A. Yes, sir, I do.
Q. Well, you just got that from talking to the engineer and conductor?
A. No, not only that, I could see how the engine dragged when she was going up hill.
Q. How do you know how much tonnage she was pulling?
A. Just heard it around from general talk and heard engineers talking.
Q. Just general talk?
A. Yes, sir.
Q. As fireman, could you tell anything about how much tonnage was in your train?
A. No, I couldn't, but I can tell sometimes by the way the engine is pulling; sometimes they pull pretty slow when they have got about all they can pull.
Q. Does the number of cars have anything to do with the tonnage?
A. Well, yes, sir, I think, I am not sure, I think 950 tons is equal to 21 loads.
Q. Well, there was no marked capacity on this engine was there, nothing on the engine itself put there by the manufacturers that marked its tonnage or capacity?
A. I don't know anything about that.
Q. And the only thing you know about the tonnage she could pull was from the talk around——
A. And the way she dragged.
Q. When she dragged would you know how much tonnage she had?

A. Why, sure, I can always tell.

Q. What do you mean by tonnage? Explain to the jury.

Q. It just the same like you took a bucket of coal, it is heavy, isn't it?

Q. Yes. Well you mean by 950 tons that she could pull 950 tons of freight?

A. Of freight, yes, sir.

Q. Does that include the weight of the cars or just the stuff in the cars?

34 A. Well, I don't know. That is including freight and cars.

Q. Well, can you tell about what the average tonnage in a loaded car is?

A. Well, no; I never did take that much interest in it.

Q. Well, the truth of the business is that your statement about the capacity of 950 tons is not based on any accurate knowledge about it at all, isn't it a fact?

A. That is a fact, a single engine——

Q. I say your knowledge is not based on any actual knowledge or investigation at all on your part?

A. No.

Q. Now, this 260 when she went down in double header from Meridian to Picayune you had no trouble about the couplers between the engine and tender?

A. No.

Q. And you had no trouble of that kind before this?

A. Yes, sir, we did.

Q. When?

A. Just about seven months before I got hurt. We was on engine 255, she was in the lead and I was firing engine 258 and Truehart Moore was engineer on 255, and one of these king pins broke, but the safety chain didn't.

Q. I am asking about the 260.

A. I don't know, I never saw the 260 break, this is the only time I saw her break.

Q. And this time when you got hurt is the first time you knew of any trouble about the king pin or couplers or safety chains or anything on the 260.

A. Well, I heard at one time she broke and pretty nearly killed a fireman.

Q. When did you hear that?

A. That was about a year and a half ago, and it happened too.

Q. You heard that a year and a half ago?

A. Year and a half if I am not mistaken. Roy Stroble was engineer and one of the firemen told me that the same engine had done the same thing.

25 Q. So you knew the night before you were hurt that the 260 had broken before?

A. No, I didn't know that, when I came to the round house these firemen told me that the 260——

Q. Was that after you got hurt that you heard that?

A. Yes, he said that that engine had done the same thing a long time ago.

Q. I thought you were talking about what you knew about it before you got hurt.

A. No, that was afterwards.

Mr. Bozeman: I was asking him about what he heard about it before he got hurt. I think anything he heard afterwards would be incompetent and I move to exclude the testimony.

The Court: I sustain the objection.

To which action and ruling on the part of the court the plaintiff then and there excepted.

Q. Now, you had been on this engine 260 for about four months?

A. Yes, sir, maybe a little over, I don't remember.

Q. During that time did you examine the coupling apparatus at all of the 260?

A. I am not supposed to do it.

Q. I am not asking you whether you are supposed to do it, but had you in fact done it?

A. No, sir.

Q. Explain to the jury again the way that that engine and tender coupled together.

A. Why, there is a drawbar like this and there is the apron over it.

Q. So that we won't get confused, just leave the apron off and talk about the drawbar itself.

A. All right, there is the drawbar.

Q. What size piece of iron is the drawbar?

A. It is about two inches thick and three and a half inches wide.

Q. Look at the railing of this stand that you are on, is it about the same width as that railing?

A. Yes, sir.

36 Q. Then it is about two inches thick?

A. Yes, sir.

Q. Then it would be thicker than this railing?

A. I don't know, but it is about two inches?

Q. Then how long is that drawbar?

A. As long as from here to here.

Q. That would be how many feet?

A. About three feet and a half.

Q. About three feet and a half, that is your estimate?

A. Yes, sir.

Q. Then you find at each end of the drawbar there is a hole?

A. No, there is only one hole, this hole where the king pin comes; I don't know what they have got on this side, I have never seen it.

Q. Which side is the king pin on that you are talking about?

A. That is on the tender.

Q. Now if this table here represents the engine and the witness stand you are in we will say represents the tender, to get the two together, now the king pin you refer to is on the end of the drawbar next to the tender?

A. It goes through the tender like this?
Q. Goes through the tender?
A. Yes, sir.
Q. And that king pin is a round iron pin?
A. Yes, two and a half inches round and twenty-eight inches long.
Q. When you say two and half round, you mean that it measures two and a half inches through?
A. Yes, sir.
Q. The distance right straight through it?
A. Yes, sir.
Q. Is two and a half inches?
A. Yes, sir.
Q. And it is a round pin?
A. Yes, sir.
Q. And about how long is it?
A. Twenty-eight inches long.
Q. And that goes through this hole?
37 A. Through the drawbar hole on the tender.
Q. What is at this end next to the drawbar, next to the tender, do you know what the mechanism is under there?
A. No, sir.
Q. Well, it fits in between two pieces of iron, works close in there?
A. I don't know, I——
Q. You don't know that there is anything under that at all. The end in here doesn't pull up and down 28 inches of pin, does it?
A. No, no.
Q. Aren't there two pieces of iron like this on the tender side?
A. Yes, sir, that is the way.
Q. And the drawbar fits right close in between there?
A. And the king pin goes right on top all of the way down.
Q. So that this has not got much pull?
A. It is supposed to be steady.
Q. So that the pull on that pin would be just that part of the pin that is between these two pieces?
A. All the way, yes, sir.
Q. And the only pull that would be on the pin would be about the thickness of the drawbar because the upper part of the pin would be separated by this piece and the lower part by this and the only pull would be right here where my finger is, right in there where the drawbar catches it, is that right?
A. Yes, sir.
Q. Now, you say it was at night when you got hurt?
A. It was one o'clock in the morning.
Q. Now, you say you were standing with one foot on the tender and one foot on the apron, I believe you stated?
A. Yes, sir.
Q. Getting a scoop of coal from the——
A. To this side, shoveling left hand, you know.
Q. You were left handed?
A. You have to shovel left handed.
Q. But you had your right side to the tender?

A. Yes, sir, left side to the other door.
A. And getting a scoop of coal this way fixing to throw it in?
38 A. Yes, sir.
Q. And while you were in that position the tender and engine came apart?
A. Yes, sir, just as I was going to heave the coal in the door.
Q. When the 260 engine pulled away from the tender that let the front engine and the engine part of 260 go on?
A. Go on ten or fifteen feet away.
A. And, of course, the train that he was pulling and your tender that was attached to the train, that part of it stopped?
A. Yes, sir. I reckon the air must have stopped it.
Q. Now, as you went down you didn't see what you struck?
A. No, but I hit my right hip on the drawbar?
—. ——.
A. Yes, sir, because the drawbar sticks out there about a foot.
Q. The drawbar sticks out there about a foot?
A. Yes, sir.
Q. Now, you had your right side to the tender?
A. There is the tender.
Q. So we can get it straight, let this table be the engine headed north and this the tender.
A. Yes, sir.
Q. Now, you had your right side towards the tender?
A. I had my foot on the tender.

Mr. Fewell: I insist that counsel ask questions and not argue.
The Court: Go ahead and ask questions.

Q. Now, Mr. Scarlet,——
A. Give me two of those books, I will explain it better. You see, there is the -gine——

Mr. Fewell: I object to counsel arguing with the witness. Let him ask the question and let him answer.

Witness: Let me explain it. There is the engine and there is the tender and there is the drawbar right here and that goes over the coupling this way and there is the apron. Now, I had one foot in here on the tender and one foot on my apron and I was just reaching
for a scoop of coal and heave it in the fire when the engine
39 parted. When the engine parted that apron came this way and the drawbar this way and I had my hip in there and I came right on down and the hose right in my back.
Q. Now, explain it to me using those two objects here.
A. Yes, sir.
Q. Now, what I have in mind and can't get straight is this——

Mr. Fewell: We object to counsel stating what he had got in his mind and can't get out of his mind.
The Court: Go ahead.

Mr. Bozeman: I submit my statement is a proper question; I am stating to the witness that I am asking him a question using these two objects. Unless I state that as a preliminary to him I can't get him to answer my questions intelligently.

The Court: The objection goes further than that, stating what you had in your mind and what you can't get out of your mind.

Mr. Bozeman: I agree that is incompetent and improper.

Q. Assuming now that this witness stand on which you sit is the tender and that this table is front is the engine, you were standing with your right side to the tender?

A. Yes, sir.

Q. And your left side to the engine, and that *through* your face, the general direction of your face looking out the gangway?

A. To the woods, yes, sir.

Q. Now, while you were in that position the engine pulled away from the tender?

A. Yes, sir.

Q. And you fell, did you, fell forward?

A. I fell this way.

Q. You were in a little stooped position handling a shovel?

A. Yes, sir.

Q. So when they pulled out from under you dropped right forward?

A. I dropped down this way.

Q. And as you dropped down there you hit your right hip?

A. On the drawbar, yes, sir.

Q. Which king pin was it that broke?

A. Why, the king pin that goes right in the tender.

Q. Well, that was the king pin on the right side, wasn't it?

A. Yes, sir, on the right side.

Q. Now, that let the drawbar go with the engine, didn't it?

A. Yes, sir; yes, sir.

Q. Now, will you explain to the jury how it was if the drawbar went off with the engine to your left and you fell between the two how you could have hit the drawbar?

A. Because the drawbar sticks about a foot and a half out from the apron, that is why.

Q. Well, the drawbar was attached to the engine that was moving off to your left?

A. Yes, sir.

Q. And if you had hit the drawbar you were bound to have hit it with your stomach or left side?

A. Well, I hit one of the air hose, maybe.

Q. You don't know whether you hit the drawbar or not?

A. I know I hit something——

Q. Will you state positively that you hit the drawbar?

A. And I am not positive it was the drawbar.

Q. Since you remember that the drawbar moved off to your left you must have hit something on the tender?

A. I think it was the drawbar.
Q. The drawbar didn't come with the tender?
A. No, it stuck out from under the apron.
Q. The apron stayed with the tender?
A. That is what I say, that I hit the drawbar because I had my left foot on the apron.
Q. Is the apron fastened to the tender or to the engine?
A. To the engine.
Q. So that the apron went with the engine too?
A. Yes, sir.
Q. And that extended out over the drawbar?
A. Yes, sir.
Q. Anyway, in the fall you bruised the front part of your hip?
A. Yes, sir, and the muscles of my back.
41 Q. And then you went down on the ground on your hands and knees?
A. Yes, sir.
Q. And you say while you were down there something hit you in the back?
A. Yes, sir.
Q. And you thought it was the air hose?
A. Nothing else could hit me.
Q. But you didn't see what hit you?
A. No, sir.
Q. And you stating that the air hose hit you is just a guess on your part—are you sure that you were hit with the air hose?
A. I am sure.
Q. Why?
A. Because nothing else could hit me, because I was lying on my stomach and nothing else could hit me on the back.
Q. When the engine and tender pulled apart did that uncouple the air hose, pull them apart?
A. I guess so, that broke the safety chain and king pin.
Q. Those air hose consist of what?
A. There is three air hose in there.
Q. Explain to us where they are attached?
A. There is three air hose—
Q. How many attached to the tender?
A. There is three.
Q. And how many attached to the engine?
A. Three.
Q. Three to the engine and three to the tender?
A. Why, sure, there is three air hose coupled up.
Q. And you mean that there are three separate rubber tubes or the air hose fastened to the tender?
A. Yes, sir.
Q. And then there are three fastened to the engine?
A. Yes, sir.
Q. So that you have got three different couplings between the engine and tender?
A. That is for the air brakes.

42 Q. How far would the engine have to pull away from the tender before it would pull them in two?

A. About six feet.

Q. Would have to pull six feet?

A. Yes, sir, before they would break.

Q. As you feel you didn't hit these air hose, did you?

A. I may have hit one of the air hose.

Q. Well, if you had hit these three rubber tubes between the engine and tender it would have broken your fall, wouldn't it?

A. I don't know whether it would or not, the safety chain is longer than the hose.

Q. Well, you didn't hit the safety chain?

A. No, the safety chain went with the engine.

Q. Well, you didn't hit the rubber hose?

A. No, I am sure I hit the drawbar.

Q. Now, where does this force come from that puts on the brakes?

A. From the engineer.

Q. Now, when the air hose pulls in two the air hose coupled to the back part of the train is perfectly dead, isn't it?

A. No.

Q. Isn't it a fact that when you pull an air hose in two that way that it immediately sets the brake on all of the train?

A. Yes, sir.

Q. Now, you say where a train pulls in two and the air brakes pull in two that way that the air hose attacked to the rear part of the train has got no force in it at all?

—. ——.

Q. Isn't it a fact that that part of the train is perfectly dead and that the air hose from the engine——

Q. No, sir, because these cars were full of air.

Q. Now, you had gone into the side track there, or rather this double header had gone into the side track to meet a train?

A. Train No. 31.

Q. And that was a passing track, was it?

A. Yes, sir, a passing track.

Q. And when No. 31 passed why then this double header proceeded to pull out of the passing track coming north?

43 A. Yes, sir.

Q. And this accident happened just as they were starting?

A. Yes sir.

Q. Mr. Scarlet, stand up there, please sir, and turn your back this way and put your hand just exactly where your back is——

A. I will take off my coat.

Q. Yes, sir, that is right.

A. It is right here you see and sometimes I am feeling pretty bad right here. (The witness here makes profert of his back.)

Q. Now, that is about three inches, you will say, above the waist band of your pants on the rig-*g* side?

A. Why, I don't know——

Q. I am trying to get it in the record; I can see and the jury can see.

A. Right around here, you see.

Q. Well, the place you are pointing to is the right side of your back and just above the waist band of your pants?

A. Yes, sir.

Q. Now, is that a soreness that you have in there?

A. Why, it is pretty sore.

Q. I am trying to get at what sort of feeling you have got in there.

A. Why, I feel like I am not the same man I used to be, and I cannot do any more hard work.

Q. But I am trying to get at what kind of pain or trouble you have got on that particular spot. What is it, a soreness there, is it a steady pain or just hurts you when you stoop?

A. It is a steady pain and an awful bad one too.

Q. Now, when you are sitting in a chair like you are now and when you are perfectly quiet does it hurt you still?

A. It is hurting a little bit, but not as much when I am walking or stooping.

Q. Now, when you are lying down?

A. Sometimes I suffer awful at night and can hardly sleep.

Q. I have to walk slow; when I try to walk up hill it would get me I can't walk fast.

44 Q. And that seems to be just around in that spot there where you showed us?

A. Where I showed you.

Q. Mr. Scarlet, when did you hear this talk about the amount of tonnage that the 260 could pull?

A. Oh, they used to have that kind of talk pretty near every trip between the engineer and conductor and sometimes between the trouble engineer and the engineer.

Q. How long,—how much tonnage is it your idea that was on this double header?

A. Why, I don't know anything about how much, I couldn't tell how much tonnage we had. I believe we had maybe 35 to 37 cars.

Q. Well, was it your idea at the time that you had more than 950 tons?

A. Yes, indeed; certainly, because twenty-one loads is equal to 95) tons.

Q. And you had nearly twice that?

A. No, we had only eighteen cars more, we had 35 to 37 cars.

Q. Now, what did you understand at the time of the accident and before the accident, what about the effect of putting an engine in the position that the 260 was in the double header, that is, the second engine, pulling more than tonnage capacity, what do you understand would probably happen from that?

A. What do you——

Q. What would likely happen if they put her in the position of the second engine and there was more tonnage in the train than she could pull?

Mr. Fewell: We object to that.

Objection overruled.

To which action and ruling on the part of the court the Plaintiff, through counsel, then and there excepted.

Q. What did you understand from your experience at the time of the accident?

A. Why, there was too much strain on the king pin. The king pin and safety chain was not built for two engines.

Q. And two engines pulling against — that king pin was
45 liable to break?

A. Yes, sir, there was too much power on that king pin and safety chain.

Q. You say you were born in 1882?

A. Yes, sir.

Q. Where were you born?

A. I was born in the old country.

Q. How long have you lived in this country?

A. I was nine years old when I came to this country.

Q. Where were you living at the time that you began firing in the navy?

A. In New Orleans.

Q. And you spent four years, you say, firing in the navy?

A. Yes, sir.

Q. Now, how long did you live in New Orleans before that?

A. Why, since I was nine years old.

Q. You have lived in New Orleans?

A. Yes, sir.

Q. What did you,—what was your business before you went in the navy?

A. Why I worked in machine shop and I worked in drygoods and grocery, everything, hard work.

Q. All in New Orleans?

A. Yes, sir.

Q. That was your home?

A. Yes, sir.

Q. Mr. Scarlet, are you a single or married man?

A. I am single.

Q. It is a part of the fireman's duty to assist the engineer in looking after the engine and seeing that the engine is in good shape, isn't it?

A. No, sir, the book of rules doesn't say that. The fireman is supposed to see that all flags — and just to protect the front of the train and see that all tools are on the engine, assist the engineer in handling the engine, but not to inspect.

Q. Well, you assist the engineer in making repairs on the engine?

46 A. No, sir, that is up to the fireman whether he wants to learn or not.

Q. Did you ever run an engine at all before this accident?

A. Well, sometimes I used to do it some switching for the engineer.

Q. You were familiar with the construction of engines?

A. Yes, sir, pretty good, I am not an expert, you know, I am pretty fair.

Q. Now, is rule 498 in this book the rule you refer to about keeping a lookout for signals and things like that?

A. 498; here it is.

Q. Read that into the record.

A. (Witness reading:) "They must assist the engine men in oiling and in repairing the engine when required, in keeping a lookout for signals, obstructions and defects of tracks and of their trains and must take charge of the engine during his absence."

Q. Well, you did those things during your service as fireman?

A. Yes, sir.

Q. You did those things during your service as fireman?

A. Yes, sir.

Q. Now, had the train started at all, was it moving at all when this accident happened?

A. Just starting.

Q. Just starting?

A. Yes.

Q. And you were going up a slight grade there?

A. Slight grade in the side track.

Q. So that it was a steady pull on the train?

A. Yes, just a little slight——

Q. And when the 260 broke in two between the engine and tender why, of course, that cut loose both engines from the train?

A. Why certainly.

Redirect examination.

By Mr. Fewell:

Q. Do you know where this train came from that you were pulling?

A. From New Orleans.

Q. What state?

47 A. Louisiana.

Q. Do you know what ever became of this link pin that broke in between this engine and tender?

A. I couldn't tell you because I was lying on the slag.

Q. Do you know whether it was a usual and ordinary size or not, the link pin?

A. It was the same size I was telling you about, two and a half inches round.

Q. Well, you didn't see it when you went out and when you came back?

A. No, sir, I didn't see it.

Q. Mr. Bozeman asked you if it was not a fact that when the air hose broke along the train line wasn't the air perfectly dead and the brakes were not set—air brakes are set by exhausting the air from the train line——

Mr. Bozeman: We object to leading the witness.

Objection sustained.

Q. How are air brakes set on the train?
A. Sir?
Q. How do you set air brakes on the train?
A. By the engineer.
Q. Well, is that by direct pressure or exhaust?
A. By exhaust and direct pressure too, sometimes.
Q. Can you tell the jury how far the train with the tender moved after the engine and tender broke apart?
A. I don't think it moved half a foot. The only thing that moved is the engine just went away from ten to fifteen feet from the tender and the train didn't move half a foot because if it had the tank would have got my head.
Q. Do you know where this apron was after it pulled apart, whether on the locomotive, on the engine or tender?
A. Why, it was right on the engine.
Q. Mr. Bozeman asked you something about Dr. Haley's treatment of you, what was that for?
A. Oh, just for my knee.
Q. What was the matter with your knee?
48 A. Well, one time I was down to the round house and I didn't have anything to do and I said that I would clean the headlight on an engine and I hit my knee on this end.
Q. Is that what Dr. Haley rubbed you for?
A. Yes, sir.
Q. When did Dr. Haley discharge you?
A. September 6th.
Q. And you were injured on what day, September fourteenth, was it?
A. Yes, sir.
Q. Something was said about your kidneys hurting you while you were at Hattiesburg, what was the matter with your kidneys?
A. I couldn't piss, I don't know what was the matter.
Q. How long did that condition last?
A. About three or four days.
Q. You mean that you didn't pass any water for three or four days?
A. Yes, sir, for three or four days.
Q. Well, did you suffer any pain from your inability to pass water?
A. Yes, sir, I did and do right now too.
Q. Well, when it did pass, what was the color of it?
A. Sometimes white and sometimes green.
Q. White and green?
A. Yes, sir.
Q. You suffer from passing water now?
A. Yes, sir, I am suffering a great deal from it right now.
Q. Did you have any trouble of that kind before you got hurt?
A. Never did in my life.
Q. When you say that you are suffering from it right now, do you mean today?
A. Today, yes, sir.

Q. Now, how much if any improvement is there in your condition today than it was several months back?

A. But very little, Mr. Fewell; the doctor gave me some tonic to drink and it does me a lot of good, but it don't relieve my pain in the back.

Q. That is all.

49 Recross-examination.

By Mr. Bozeman:

Q. This train that you were riding on, so far as you are concerned it started at Picayune, that is where it was made up?

A. Yes, sir, but the cars came from New Orleans.

Q. That is what I want to ask you about.

A. Yes, sir.

Q. The base, you say, of that trip was at Picayune?

A. Sir?

Q. You didn't come with that train from New Orleans?

A. No, sir.

Q. Where did you get on the train?

A. Picayune.

Q. And that is in the State of Mississippi?

A. Yes, sir.

Q. And how far is that from the Louisiana line?

A. About forty-four or forty-five miles, something like that, from Picayune to New Orleans, La.

Q. Did you see the cars when they came into Picayune that you spoke of?

A. No, sir.

Q. When you were called and went to your engine the train had been made up and come out?

A. No, sir, we had to make it ourselves.

Q. Did you help make the train up?

A. Yes, sir.

Q. Well, the cars that you put in that train were in the Picayune yard?

A. Yes, sir.

Q. And that was in the State of Mississippi?

A. Yes, sir.

Q. And the only personal knowledge that you have got about these cars is that you picked them up in the Picayune yard at Picayune, Mississippi?

A. Yes, sir.

Q. Of your own knowledge, you don't know where they came from?

50 A. I know they came from New Orleans.

Q. Let's see if you do——

A. I know all cars that come to Picayune come from New Orleans, they have no other route to come from——

Mr. Bozeman: We object to that statement as being incompetent——

The Court: Objection overruled.

To which action and ruling on the part of the Court, the Defendant, through counsel, then and there excepted.

Q. Do you know what we mean by personal knowledge, did you have any personal knowledge or just what you heard?
A. No, I know they came from New Orleans, because all cars they get is from New Orleans, there is no other place to get them.
Q. Well, these cars that you picked up in the train, where were they when you came down to the depot?
A. They were right in the yard.
Q. Were they just standing on the sidetracks?
A. Yes, sir.
Q. Standing on sidetracks in the Picayune yard?
A. Yes, sir.
Q. And you didn't see them before you went down there to make the train up?
A. No, sir.
Q. But when you got there they were standing in the Picayune yard?
A. Yes, sir.
Q. And you took these cars that was standing in the Picayune yard and made them up in to this double header and started out?
A. Yes, sir.
Q. And you don't know, as a matter of fact, whether they came to Picayune from the north or from the south?
A. No, I don't know, but I don't think——
Q. You were not in New Orleans when these cars came out of there or wherever they came from?
A. No, sir.
Q. Your knowledge of them is limited to finding them standing in the Picayune yard at Picayune?
A. Yes, sir.

51 Mr. Bozeman: We move to exclude as incompetent the testimony of this witness as to that part of this train coming from New Orleans, La., because the testimony of the witness shows that it is not based upon his personal knowledge.
The Court: Motion overruled.
Mr. Bozeman: Note the exception.

To which ruling and action on the part of the Court, the Defendant, through counsel, then and there excepted.

Mr. Fewell: Is the conductor here that was on that train?
A. Yes, sir.

(Witness excused.)

Dr. T. J. Smith (White), being first duly sworn, was produced and testified as follows, to-wit:

Direct examination.

By Mr. Fewell:

Q. What is your profession?
A. Regular physician.
Q. Where do you practice?
A. Meridian, Mississippi.
Q. Are you a graduate of a medical college?
A. Yes, sir.
Q. What college?
A. Atlanta School of Medicine.
Q. How long have you been practicing?
A. Five years in April, 26th of next April.
Q. Did you have occasion to examine Mr. Joe Scarlet at any time?
A. Well, I have been doing his practice, I suppose, for some eighteen months, and he came to my office — best I remember about the middle of December.
Q. Will this refresh your recollection as to the time?
A. Yes, sir, it was on the 12th, I gave this on the 14th, he came to my office two days before this and I told him that I wanted a few days to study his condition before I gave an opinion about it at all.
Q. Well, did you take the two days to study his condition?
A. Two days, yes, sir. I gave him some medicine the first day he was up there, he was complainaing with constipation and
52 troubled with his urine and I gave him a purgative and something to keep him easy for the two days.
Q. Just tell the jury in your own way, using as untechnical terms as you can, what you found wrong, if anything, with Mr. Scarlet?
A. I found a considerable tenderness on the right side near the liver, the liver seemed like probably three or three and a half inches eniarged, and his color very bad, indicating a poor elimination either through his bowels or kidneys, and I found his temperature normal. His pulse, as near as I remember, was something like ten or twelve beats to the minute too fast, and I found considerable tenderness over his entire right side, especially in the portion just above his hips, between his ribs and his hips; and I found to the best I could tell by palpaation, or by feeling with my hands, that there was a slight curvature of the bone, which is very hard to tell definitely on account of getting a man in a perfectly straight position. The bone is flexible and, of course, without you can get a man's spine perfectly straight, it makes a big difference in the feeling or palpation as to whether the spine is injured or not, but I thought that the spine was slightly twisted to the right. And he told me——

Mr. Bozeman: We object to what he told you?
The Court: Objection sustained.

Q. You say the spine, in your judgment, was slightly twisted to the right?
A. Yes, sir, there was a slight curvature about the small, about

the second or third lumbar vertabræ, or, in other words, something like four or five inches above the junction of his hip joints with the back bone.

Q. You say you have been treating him for how long?

A. I have been treating him about eighteen months. He came to my office about the twelfth of December. I treated him then about three weeks, treated him some three or four weeks. I told him at the time that I would see if I could get his kidneys to eliminating perfectly and his bowels and, if I couldn't, I would turn him over to an osteopath.

53 Q. Were you compelled to do that?

A. I got very little results. Sometimes during the three weeks I treated him I had him to save what urine he had voided during the twenty-four hours and I could see no perceptible difference, and the second time I had him bring what he had voided from this one evening to the other and he brought back hardly two ounces and said that is what he had voided during the twenty-four hours, and it was about the same at the end of the treatment, and I told him I could do nothing for him and advised him to go to an osteopath.

Cross-examination.

By Mr. Bozeman:

Q. He came to see you on or about December 12th?

A. Yes, sir.

Q. Came to your office?

A. Yes, sir.

Q. Walking?

A. Yes, sir.

Q. Using any stick or crutch or any cane?

A. It seemed to me he had a stick, I am not sure about that.

Q. Where is your office, Doctor, with reference to where he lives?

A. He lives on 31st Avenue and Davis Street, or Sixth, and my office is on 22nd Avenue and Fourth Street, would make it two to twelve blocks, I suppose.

Q. That is about three-quarters of a mile?

A. Something like that, yes, sir.

Q. Now, all of the treatments you gave him and examinations were at your office?

A. Yes, sir.

Q. You didn't visit him at any time at home?

A. No, sir, not during this illness.

Q. Did you treat him before this?

A. Several times, that is, before this injury.

Q. What did you treat him before his injury for?

A. Malarial fever.

Q. How long before his injury?

A. Well, I declare, Mr. Bozeman, I couldn't tell you exactly; it was something like though I suppose four or five months

54 along in the spring of 1915 that I treated him.

Q. How much malarial fever did he have at that time?
A. I think he was down about three or four days.
Q. You mean down, he was down in bed?
A. Yes, sir.
Q. Had a good deal of fever?
A. Well, his temperature run about 103, I think.
Q. Do you know how long he was off from his work from that malarial fever?
A. About a week.
Q. Well, malarial fever involves the liver?
A. Yes, sir.
Q. And the kidneys also?
A. No, no, sir, not always.
Q. But it frequently does?
A. Not in this country.
Q. Just the liver?
A. Yes, sir.
Q. Now, before that what did you treat him for?
A. The same trouble, he had several attacks of malaria.
Q. How long before this last attack was the other one?
A. Well, I couldn't give you any idea, it was sometime——
Q. Just approximate it, Doctor.
A. It was probably some four or five months before that, it must have been in the late fall.
Q. Late fall preceding that?
A. 1914, yes, sir.
Q. Then the last attack of malarial fever was four or five months before this injury?
A. Something like that, I suppose, along in the spring, if I remember correctly.
Q. That would make it about July?
A. I think it was earlier than that, I think it was in the spring months.
Q. In the spring months?
A. Yes, sir.
Q. Then about four or five months before that, in the
55 fall, you treated him for another attack of malarial fever?
A. It was probably later than that, I don't know——
Q. How long was he confined in bed then?
A. Some length of time, approximately——
Q. About a week?
A. Yes, sir.
Q. Did you treat him for any other troubles besides there attacks of malarial fever?
A. No, sir, never treated him.
Q. When he came to you on December 12th he was complaining, I believe you said, of constipation?
A. Yes, sir.
Q. And of some trouble in voiding his urine?
A. Yes, sir; not so much trouble with his hurting as he couldn't

pass his urine, he couldn't urinate enough and he wanted to frequently and only very small quantities each time.

Q. Well, the conditions that cause this malarial fever also produce constipation, don't they?

A. They do right at the time when the malarial fever—when the germs are multiplying.

Q. Isn't the first thing that the doctors do when you have got malarial fever is to get your bowels to going?

A. Yes, sir.

Q. To clean you out?

A. Yes, sir.

Q. And that is because of the fact that you are constipated and constipation produces these bad results?

A. Not the same results that malaria will produce. We give a purgative not so much for constipation as to aid other medicines to kill the malaria germs.

Q. But the constipation if it remains will aggravate their condition?

A. Yes, sir.

Q. Now, did you have him to void any urin- in your office to examine him?

A. No, sir, he said he couldn't void any at that time, only urine I saw is what he——

Q. But as to the time that covered the voiding of that urine
56 and all that you depended entirely on his statement about that?

A. Yes, sir.

Q. Well, you only examined this urine as to the quantity?

A. I examined it as to its chemical properties and——

Q. What examination did you make yourself?

A. I made a chemical examination. I took the specific gravity, it was high, it was a thousand and forty. But there was nothing chemical and nothing was found wrong microscopically.

Q. The only thing you found was a high what?

A. Specific gravity. I attributed that to the small quantity of urine he passed and being heavily loaded with solids.

Q. Well, when the kidneys pass a great deal of urine the specific gravity is light?

A. Yes, sir, as a rule.

Q. And where a small quantity it is heavy?

A. Yes, sir.

Q. That was the only trouble you found?

A. Yes, sir.

Q. Well, did you give him any treatment for his liver?

A. Yes, sir.

Q. Did you relieve his constipation?

A. By giving him something to act on his bowels I did, but I didn't get any permanent results.

Q. Well, Doctor, the best treatment in the world for constipation and that sort of trouble is the osteopathic treatment?

A. I consider it so, yes, sir.

Q. The osteopath, with the hands, works the liver and softens it up and kneads it and rubs the nerves that go to it and, in that way, stimulates it, and, knowing that to be a fact, you advised him to go to an osteopath?

A. Exactly, and also for the trouble that I thought he had with his spine.

Q. Now, Doctor, it is a fact, isn't it, that many people who are in a normal condition and in fair health have some little curvature of the spine, don't they?

A. Lots of times in normal healthy people, so far as we know.

Q. When a fellow gets what we call stoop shouldered that
57 is a curvature of the spine?

A. Yes, sir.

Q. Well, a fellow getting stoop shouldered doesn't affect his health?

A. Sometimes, not often.

Q. Well, there are very few people who have not got one shoulder higher than the other?

A. Yes, sir.

Q. And when they go to the tailor's they try to fix that up by padding?

A. Yes, sir.

Q. Well, that is a curvature of the spine that makes that?

A. Yes, sir, very slight.

Q. Well, if a fellow's shoulder is exactly straight that indicates that the spine is straight?

A. Yes, sir.

Q. The fact that you find curvature of the spine don't indicate that there is anything wrong with him?

A. Not every time.

Q. And a man that sits at a desk and writes in a stooping position and it don't affect his general health at all?

A. No, sir.

Q. And a man that does any heavy labor, for instance take a fireman who stoops in one position, say a left handed or right handed man who has to work in a stooped position, isn't he liable to get some curvature of the spine from this work?

A. Yes, sir.

Q. Now, in Scarlet's case you only tried to determine that, as you say, by an examination of your hands?

A. Yes, sir.

Q. In other words, you held Scarlet as straight as you could?

A. Yes, sir.

Q. Of course, any motion he made of his body would curve his spine?

A. Yes, sir, like I said awhile ago, you couldn't tell whether it was curved or not.

58 Q. You didn't discover any abnormal discoloration about this urine?

A. It was rather light to be as heavy as it was, I mean that the color was rather light.

Q. You didn't discover any green discoloration?

A. No, sir, none in what he brought me.

Q. Any white discoloration?

A. That is what I say, the urine was rather clear for the specific gravity to be as much as it was.

Q. Well, when you get urine in that condition like it was, that is not white, it is a kind of straw color?

A. No, it is lighter than a straw color, it is kind of milk, but it was not white as milk, but kind of smoked white.

Q. And you examined it chemically?

A. Yes, sir.

Q. And found nothing wrong with it chemically?

A. No, sir.

Q. And had it examined microscopically?

A. Yes, sir.

Q. And found nothing wrong with it, except the specific gravity?

A. That was all that I found wrong with it.

Q. That is all.

Redirect examination.

By Mr. Fewell:

Q. From your observation and examination of Mr. Scarlet and the injury to his back, what would you say was the cause of it?

Mr. Bozeman: We object to that. I don't think that is a proper question calling for expert opinion.

Objection overruled.

To which action and ruling of the Court, the Defendant, through counsel, then and there excepted.

A. The cause of the injury to his back——

Q. The cause of the condition of his back?

A. From the shortness, or from the length, of what I took to be the curvature, I thought it was due to an injury or some sudden jerk in the back; that was my opinion of it at the time, that from the way he described his fall to me that the back bone being stationary the lower portion of it between the hips and the balance of his body perfectly immovable that it had kind of twisted his back and
59 caused just a short curvature there. That was my opinion of it.

Q. Did he have malarial fever December 12th when you examined him?

A. No, sir.

Recross-examination.

By Mr. Bozeman:

Q. When you speak of the back bone being twisted, do you mean twisted around like you twist——

A. No, I don't mean that like you mean.
Q. You mean just bent?
A. That is what I meant.
Q. And you only found that condition in how many of the vertebræ there?
A. I thought there was about two or three, it was short.
Q. And that was so slight, though, whatever it was, that you are not sure——
A. I would not be willing to swear.

(Witness excused.)

Dr. J. H. Rush, (White), being first duly sworn, was produced and testified as follows, to-wit:

Direct examination.

By Mr. Fewell:

Q. Your name is J. H. Rush?
A. Yes, sir.
Q. Where do you live?
A. Meridian, Miss.
Q. Have you an X-ray machine in your infirmary?
A. Yes, sir.
Q. Did you ever have occasion to make an X-ray photograph of Mr. Joe Scarlet's back bone?
A. Yes, sir.
Q. Is that it?
A. Yes, sir.
Q. Tell the jury in what position you placed Mr. Scarlet when you took the X-ray?
A. Placed Mr. Scarlet flat on his back as near as I could get it on an X-ray table, table made to take X-ray pictures, perfectly firm so that he would be as nearly straight as possible.
60 Q. Did you make any physical examination of Mr. Scarlet?
A. No, sir.
Q. Are you an expert at reading an X-ray plate?
A. No, sir.
Q. Is this a correct representation of the X-ray you took of the spine of Mr. Scarlet?
A. Yes, sir.

Mr. Fewell: We offer this (indicating the photograph) in evidence.
The Court: Very well.

Cross-examination.

By Mr. Bozeman:

Q. Doctor, what is an X-ray?
A. It is a shadowgraph, produces the shadow of dense structures.

Q. And does this X-ray you have got there show anything besides the bones?

A. Well, that is a part of it that I couldn't read. I am not expert enough to read tissue. It takes an expert to read tissue and I have only had six years' experience.

Q. When you say tissue is that what you ordinarily call meat?

A. Yes, sir, that is the soft structure.

Q. Well, the X-ray, as you say, is just a shadow?

A. Yes, sir.

Q. Do you put the plate underneath the man?

A. Yes, sir, underneath the man.

Q. You lay the man out on a table and put that glass plate under him?

A. Under the object, yes, sir.

Q. Whatever you want to take and then you have a strong light above him?

A. *Under the object, yes, sir*

Q. *Whatever you want to take and then you have a strong light above him?*

A. Yes, sir.

Q. And you just throw that light on the man lying there?

A. On the object.

Q. And it throws a shadow on that plate?

A. Yes, sir.

Q. And about the only thing dense in a man's body would be the bones?

61 A. Would be the density of the structure, the bones being denser than the soft parts, of course, makes the shadow.

Q. Now, in this particular case, did you put Scarlet on his back?

A. On his back.

Q. Laid him on his back?

A. Yes, sir.

Q. And then the light would be shining down on his stomach?

A. Yes, sir.

Q. And the shadow would be caught on the glass and would show him just as if you were looking through his stomach?

A. Yes, sir.

Q. Now, the spinal column is a very flexible thing, it bends very easily to the side, forward and back?

A. Yes, sir.

Q. Now, the spinal column is a very flexible thing, it bends very easily to the side, forward and back?

A. Yes, sir.

Q. And it is just like straightening out any other flexible object, you may get it straight and may not?

A. That is true. The first one I made I thought I had him straight, but I didn't, and when I made the picture I found out he was a complete rainbow.

Mr. Fewell: You don't refer to this picture here?

A. No, sir.

Q. This was the second effort you made?

A. Yes, sir.

Q. And this second one you took you thought you had him straight and when you came to look at it you found he was laying to one side?

A. Yes, sir.

Q. Then you tried it again and got the best you could?

A. Yes, sir.

Q. Now, Doctor, of course, as you straighten a man out on your table you can't see his spinal column you can only judge from laying his whole body straight?

A. Yes, sir.

Q. The spinal column being in the man and curved up so far as you were concerned is an imaginary line?

62 A. Yes, sir, and with his clothes on too.

Q. Now, if you happened to get a man a little twisted on the table then the spine would show a little twisted?

A. It would show a gradual curve of the body.

Q. So that the general effect of this picture or X-ray may show some little curvature that doesn't necessarily show that the man's spine is really curved, it may have been curved as it lay on the table and not curved in his normal condition?

A. I don't know that I know what you have reference to.

Q. Does this picture here show any curvature of the spine?

A. Slight. If you will look at this picture you will see that the line is not absolutely straight, there is just a gradual incline to one side. You see this line from this edge of the plate is a little further than from there to there. It shows that the plate was not square under him—it shows that the hip bones were just slightly tilted.

Q. Now, doctor, they way that you are holding that plate now before the jury shows the upper part of the spine at the top of the picture.

A. There is the upper part, here is the hip.

Q. Those two large, white-looking places at the bottom represent the hip bones?

A. Yes, sir.

Q. And that white line in the middle represents the spine?

A. Yes, sir.

Q. And up here in the top of the plate I see something coming out like ribs.

A. That is the ribs.

Q. Now, where is it in that picture that the picture shows a slight curvature?

A. Well, it is just a gradual inclination over to this side.

Q. Just a gradual inclination to the right-hand upper corner?

A. Yes, sir; if you will inspect it real close you will see it is slight, but to look at it carelessly you would not notice it.

Q. There is no sharp curve anywhere in there at all?

A. No, sir.

Q. Just a gradual inclination to the right?

A. Yes, sir.

63 Q. Where does that inclination start?

A. It just seems to be gradual all the way, as I said.

Q. Now, the picture may have been made that way because of the body not lying exactly square with the plate?

A. Yes, sir, I think that was it.

Q. So that really the position that the man was lying in would make the position of the picture?

A. Yes, sir.

Q. Now, looking at that picture there, from your knowledge of medicine, do you see anything wrong with the spinal column?

A. The only thing that I can see the least bit wrong is the first vertabrae, as I see it, just slightly turned the least little bit. Whether it is a curvature or not I am not able to determine.

Q. That is the one below where the ribs show?

A. Yes, sir, between the first and second.

Q. Turned to the right?

A. Yes, sir, the upper part is slightly turned to the right, to the left of the person, but to the right as we are speaking.

Q. And you can't say whether that was caused by the position of the body or not?

A. No, sir.

Q. Or whether if he had twisted his back home just a little that would have straightened that out or not?

A. I can't say about that.

Q. You can't tell anything about that?

A. No, sir.

Q. When was it, Doctor, that you took the picture?

A. January 21st, I think, as well as I remember.

Q. Of this year?

A. Yes, sir, January 27th, 1916.

Q. Which lumbar vertabrae did you say that was?

A. First lumbar vertabrae.

Q. Doctor, what part of the body is supplied by the nerves that come out of the back bone at the first lumbar vertabrae?

A. It supplies the lower part of the abdominal wall on the right side.

64 Q. Down about the scrotum?

A. Yes, sir, supplies the scrotum and the front part of the leg.

Q. Will you state that again?

A. It supplies the lower part of the abdominal wall on the right side, the scrotum and front part of the thigh.

Q. Just stand up and show the jury by reference to your own body.

A. The lower part of the abdomen on the right side supplies the scrotum on the right side and the front part of the thigh.

Q. So that if that vertabrae you spoke of on the plate shows a little twisted, if that were a little twisted, the parts of the body that would be affected by it would be the lower part of the abdomen and scrotum and that part of the right leg?

A. It is just as bad to one leg as the other. It is owing to which side was affected and, for argument, assuming that the right side was pinched the trouble or defect would be on the right side.

Q. If the liver rested on the nerves that were pinched by that vertabræ it would be the lower part of the abdomen of the right side would be the parts affected?

A. Yes, sir.

Q. And the only trouble that would come from the slight curvature would be that the slight cur-agure of that vertabræ might pinch one of the nerves that come out of the spinal column at that point, that is the trouble you would find probably?

A. Well, I am unable to say. I would rather not answer that question unless I have to.

Mr. Fewell: Just give your opinion about it as a physician.

Q. I reckon you have answered the question, if the nerves that come out of the spinal column at that point of the injury supply the parts of the body you have indi-aged.

A. Yes, sir.

Q. Now, I want to ask you one question. Now, in holding this plate like you had it with the film side up, the film side is the dull side?

A. Yes, sir.

Q. Now, in holding that up between yourself and the light, are you looking from the front?

A. Yes, sir.

Q. You are looking at the man's stomach?

A. Yes, sir, you are looking through him from the front.

Q. Stand aside.

(Witness excused.)

Dr. J. D. Shirey, (White), being first duly sworn, was produced and testified as follows, to-wit:

Direct examination.

By Mr. Fewell:

Q. What is your profession?

A. I am a doctor of chiropractic.

Q. What does that mean?

A. The meaning of the word is hand practice.

Q. What do you have to deal with in your practice?

A. We adjust the vertabræ of the spine.

Q. Are you a graduate of that profession?

A. I am a graduate of the Palmer school, which is the fountain head of the science.

Q. Well, do you consider yourself an expert in that line?

A. Yes, sir.

Q. Have you seen the plate that has been introduced in evidence here, the X-ray plate?

A. I have.

Q. When did you first see the plate?

A. Why, Mr. Cameron brought it up to my office some four weeks ago.

Q. Now, Doctor, can you read that plate?

A. You mean to read the——

Q. Can you tell anything about the picture, anything wrong about the picture?

Mr. Bozeman: Wait a minute——

Q. With your experience and practice and your knowledge of the bones or vertabrae, can you locate on that picture and point out on it to the jury whatever was wrong with the man in that picture?

Mr. Bozeman: We object to this because this witness has not yet qualified to testify as an expert on matters pertaining to
66 medicine or the spine.

Objection overruled.

To which action and ruling on the part of the Court, the Defendant, through counsel, then and there excepted.

A. As far as I see, that spine, from what knowledge I have of reading spines, reading X-ray plates, I find a subluxation, a partial separation of the second lumbar vertebrae.

Q. Now, point that out to the jury on that picture, please.

A. Well, right here between the first and second lumbar vertebrae if you will notice, there is a little shadow showing a separation, a partial separation of the vertebrae, which causes the light to break through the two bones, which are the lamina. If you will hold that plate, I will show you the spine. This is a human back bone. (Witness produces a skeleton of back bone.)

Mr. Bozeman: You are going to identify that?

Mr. Fewell: I am going to let him use it for demonstration purposes.

Witness: What I expect to do is to demonstrate what I find on that plate by this spine. This is the human spine, with the exception of these rubber tubes, which represent the nervous system. Every nerve of the body arrives at the brain by way of the column group with the exception of a few direct nerves. The spinal cord comes down through the central canal of the spine. The individual nerves leave the spinal cord through these openings termed foramen. Now, of course, that opening when full of cartilage and flesh is no larger than a piece of string. Now, that nerve leaves the spinal cord through this opening that goes to this tissue just like these two wires are expressed from the dynamo in that light. The only place where a nerve is fully surrounded by bone tissue, which is the only firm tissue of the body, is as it leaves the spinal cord in this opening. That is the only place where a nerve is fully surrounded by the tissue. In other words, as long as these vertebrae are in normal relation to one another these openings are normal in size. The bones here, as you see, should be right against one another in that position. Now, you let a vertebra become subluxated, which means a partial separation, that vertebra is thrown out of line, is in that position,—

67 in doing so it separates the two bones back here. Now, that is what I find, there is a separation here which permits the light to strike through. You understand that an X-ray just makes a shadow of the bone. Where that light can strike through it makes a dark streak, the light can strike through these two bones. That makes the shadow as I showed you on that spine.

Q. Point out on this shadow here just what you find.

A. Upon this shadow I find a subluzation right here, between the first and second lumbar vertebræ.

Q. Now, point that out, Doctor, to the jury on the spine you have there, using the same vertebræ.

A. There is a subluxation of the second lumbar vertebræ right through here. Understand that body is shown from the front. Now, that light is shown right through these two lamina. Of course, this rubber hose is in the way. But if you can see through you can see a light through there—you can see between those two bones. Now, there is a shadow which I see on the plate, which is a subluxation of that vertebræ.

Q. Put your pencil on the plate in order that the jury may see it and point that condition out on this plate.

A. Now, it is very dim, of course. The space is right here between these two little bones, right there, there is a shadow up there, you may notice a dark streak running right between these two bones. Now, there is the subluxation as I see it, the subluxation of this bone which separates these two bones in that way.

Q. What effect does that have on the nerve surrounding the first vertebræ?

A. Where that vertebræ is subluxated it closes this opening to some extent. Well, that places a pressure upon that local nerve, not the spinal cord, but the local nerve going from the spinal cord to the effect. Now, wherever that nerve is expressed, whatever percentage of pressure is placed upon that nerve it cuts off that percentage of the natural stimulant from the brain going to the effect. The brain is the dynamo and the light is the effect. Now, whatever percentage of pressu-e is placed upon that ne-ve it cuts off that per-

68 centage of vital force.

Q. Now, you say that is between the second and third vertebræ?

A. Between the first and second vertebræ?

Q. Have you ever examined Mr. Scarlet?

A. I gave him an analysis.

Q. I mean after you saw this X-ray plate.

A. Yes, sir.

Q. Tell the jury whether or not you were able to locate on his person the object you have indicated on that plate.

A. I found a subluxation on his person the same as I did on the plate.

Q. Can you point that out on the plaintiff's back now?

A. Yes, sir, if his back was exposed.

Q. Come around here, Mr. Scarlet.

The plaintiff came around before the jury and exposed his back by removing his shirt and was placed on a stool.

Witness: Gentlemen, as long as these vertebræ are in normal relation to one another the spinous process, which are the tips of these bones, are in normal relation to one another, these tips should be in line. I have my finger upon the first, second and third lumbar in that position. Now, if you notice this finger there is a little curvature to the right of that finger. Now, by comparing this vertebræ with the one above and the one below it shows me that this vertebræ is subluxated to the right. Now, from the knowledge I have of the spine it shows me that the nerve is impinged right here. Now, to prove to myself that that is correct and that the nerve which becomes impinged is very sensitive to touch, whereupon I place my finger just to the side of where that nerve leaves the spinal cord. It is very sensitive and more so than on the other side. Now, that is the process I went through to verify my statement of that plate. When this gentleman was brought to my office I found this same subluxation I found here impinging the nerve here. You notice how he flinches to that in comparison to the other side. Now, that nerve is pressed upon by the subluxation of that vertebræ closing the opening.

Q. Take the witness.

69 Cross-examination.

By Mr. Bozeman:

Q. Doctor, you are not a physician, are you?
A. No, sir.
Q. Nor a surgeon?
A. No, sir.
Q. You are not a graduate in medicine?
A. Not in medicine, no, sir.
Q. Did you ever go to a medical school at all?
A. No, sir.
Q. Or to a school of surgery?
A. No, sir.
Q. You have got no license to practice medicine?
A. No, sir.
Q. You don't give any medicine?
A. I don't practice medicine in any way.
Q. What sort of practice do you do.
A. I am a practitioner of chiropractic.
Q. Is that the same as osteopathy?
A. No, sir.
Q. What does an osteopa-h do?
A. The osteopath treats the effect without the use of medicine.
Q. By manipulating the hands?
A. By manipulation and massage. Now, that is the way I understand osteopathy, I am not saying that as an expert.
Q. Now, do you treat anything besides the back bone?

A. I do not, no, sir, I adjust only the vertebræ of the spine.

Q. According to your idea when you find a man suffering from some kind of ailment you can always trace that to some trouble with the back bone?

A. You can trace the cause of that ailment to the back bone.

Q. How would you treat Mr. Scarlet's trouble?

A. If Mr. Scarlet was my patient I would adjust that second lumbar vertebræ back into normal position.

Q. How would you do that?

A. It is done by a quick movement of the hands against the vertebræ o fthe spine.

70 Q. Well, you can do that?

A. Yes, sir, that is my work, it is my work to adjust these vertebræ back into normal position.

Q. And you have made adjustments of trouble just like you found in this man?

A. Yes, sir.

Q. And this trouble is trouble you can readjust and cure?

A. Yes, sir.

Q. Just explain to the jury—Mr. Scarlet, come back here again just a minute, pull your coat off, please, sir. Doctor, just explain to the jury how you would readjust that subluxation.

A. In order to give that adjustment I would have to have him in a different position than I have him here. I have two little tables about that high, suppose something like that. I would place him on his knees on this table here and right over on his breast on this other table. That gives me a stand to work on. Than I palpate over this vertebræ where I find this subluxation as I showed you awhile ago. That bone has got to be driven back into line with the one above and below.

Q. Which way would you have to drive the bone of Scarlet to remedy that trouble?

A. The vertebræ has got to become first posterior before it can get lateral. In other words, it is posterior and to the right.

Q. In other words, as I understand you, this second lumbar vertebræ, as you express it, is a little subluxated to the right?

A. Yes, sir. Now, that bone has got to be driven interior and to the left, to the opposite of exterior and to the right.

Q. Diagonally, that way?

A. In this direction. Now, that is done by placing the patient in this position. It would be this way. Now, the bone is driven in this direction.

Q. Now, you do that by placing your hands——

A. Right under the shoulder. If I find a sublaxation I exchange places with this finger to this little bone, place it right against that bone. The hand is in such position to where it is only touching that one bone of the spine. It is not a blow, I do not raise my hands at all. The patient is relaxed, then I clamp this wrist with the

71 other hand and then it is with a quick recoil, the patient is supposed to be relaxed.

Q. Without his knowing what you are going to do you give a quick twist?

A. Yes, sir, and that vertebræ twists. Understand, that don't go back in one adjustment. It moves just the least little bit. It may take several weeks or months to work it out. It moves just a little bit each day. Nature has control of that local nerve. Therefore, this effect is thrown off by the actual forces of nature.

Q. Just looking at Mr. Scarlet's back here just like it is, an exterior view of his back don't show any trouble of that kind?

A. I wouldn't say he has a curvature of the spine. You have got to detect that by a keen sense of touch. It would be impossible to see that, of course, but by the sense of touch, by palpation here,—I palpate the vertebræ, compare them with one another. Of course, I am only interested in this one bone in this case, the one I find in this place. When I strike that vertebræ, the sense of touch guides my finger to the right which shows that vertebræ subluxated there.

Q. Referring back to the bone, which vertebræ is it?

A. The second lumbar.

Q. That is the third one from the abdomen?

A. The third one from the abdomen.

Q. And that now is displaced how?

A. It is subluxated to the right.

Q. The point of that bone is pushed a little around to the right?

A. A little to the right, yes, sir.

Q. What effect does this have in here?

A. It closes this opening through which the nerve passes.

Q. And you can treat what it is closing up *that?*

A. That is the opening through which the local nerve passes. In such position as that it is a partial separation.

Q. Now, where is it that you see the shadow through that picture?

A. You see as long as the bones are in normal realtion to
72 one another they would be against one another in here. Now, where it becomes subluxated it separates the bones here. Now, that shadow is between these two bones.

Q. You don't see a shadow in between this or across that way, it is a shadow on the side of the bone?

A. Yes, sir.

Q. Now, show me on this picture what you call a shadow there.

A. You see this shadow right up there. Now, there is the separation, this is the subluxation; now, there is that space up there between these two bones.

Q. Now, *ehre* is the pressure on the nerve?

A. On this side.

Q. Which side of the body is that?

A. That is on the right side. This is taken with the body upon, that is, on the right side. That is on that local nerve leaving the spinal cord between these two bones. That subluxation closes this opening through which that nerve passes.

Q. Now, this trouble that you discover in Mr. Scarlet there caused

by that partial subluxation, according to your practice, that is a curable trouble?

A. That is adjustable, yes, sir.

Q. You mean you can relieve the pressure of that nerve by adjusting that vertebræ?

A. Yes, sir.

Q. Now, that nerve you say is pressed there what parts of the body does that nerve supply?

A. That affects the tissue of that part of the back and some intestines more than any other nerve of the body.

Q. Then it don't control the lower part of the abdomen and the leg?

A. No, sir—just opposite the vertebræ and some intestines, for instance constipation and things like that would be more involved than any other trouble.

Q. Well, does it affect any other organ of the body?

A. Principally the small intestines.

Q. I asked you though was any other organ of the body affected?

A. Not especially.

73 Q. And the result you would expect to find from the pressure of that nerve would be constipation?

A. Yes, sir.

Q. Well, does it have anything to do with the muscles of the back?

A. That part of the back, yes, sir.

Q. Isn't it a fact that that nerve comes out of the spinal column forward and not back, doesn't it come to the front and not to the back?

A. It may go any direction, understand *these* are hundreds of nerves——

Q. But getting down to this particular nerve between the second and third vertebræ on the right side, isn't it a fact that when that nerve comes out of the spinal column at that place that it comes to the front and doesn't go back?

A. No, sir, it affects the tissues around that part of the spine as well as inside the system.

Q. The nerve that comes out of that place affects the muscles of the back?

A. The muscles of that local spot.

Q. You mean right here on each side of the back bone where it comes out?

A. Yes, sir, the muscles nearest to that portion of the spine, it affects that. Then that vertebræ will affect the nerves affecting that part of the back as well as the small intestines.

Q. You mean the superficial or outside muscles?

A. That portion of the muscles to which these nerves go.

Q. But they do not go to the kidneys or to the liver?

A. That special nerve does not.

Q. That special nerve does not affect either the kidneys or the liver?

A. No, sir.

Q. Now, what nerve is it that goes to the lower part of the abdomen and scrotum?

A. Well, you will find the third or fourth lumbar vertebræ. The first and second lumbar vertebræ below the vertebræ which I find subluxated on that plate.

Q. The first and second one below that?

74 A. Yes, sir, that is the second lumbar vertebræ which I find subluxated.

Q. And the nerves you speak of come out between the second and third or——

A. Between the first and second.

Q. Did you ever do any dissecting work yourself?

A. Well, not personally, on through the class, because it is not compulsory because we do not do surgical work.

Q. Now, doctor, have you ever by dissecting the human body yourself traced out these nerves?

A. We trace the nerves, you can trace them on a patient.

Q. I mean you can see the nerve when you cut a body open?

A. Yes, sir.

Q. And you can feel a nerve by dissecting and cutting the body open, you can detect the nerve that comes out of any portion of the spinal column there and actually trace it along to where it goes?

A. Through dissection?

Q. Yes.

A. Yes, sir.

Q. What color are the nerves?

A. It is generally of a gray color.

Q. Easily traced in the body?

A. Yes, sir——

Q. Have you ever done any practice of that kind?

A. Not through dissecting. You understand in tracing a nerve you can detect that nerve by the sensitiveness of the nerve. The nerve is no more than a conductor, the same as wire.

Q. Well, the sensitiveness goes with the nerve?

A. Yes, sir, the nerve is a conductor of sensitiveness.

Q. Would the actual physical nerve produce this effect by an injury to it?

A. Yes, sir. You take a man that is dead that sensitiveness is not there. In dissecting work, for instance, you can trace the nerve more accurately by a person that is alive than you can by dissecting.

Q. How can you tell?

75 A. Come up and I will show you any time in Meridian.

Q. Can you tell when you press a man's flesh and it hurts him?

A. Yes, sir.

Q. How can anybody tell when you press a man on the back and it hurts that the nerve runs some sort of way and goes in certain parts of the back bone——

A. We get that by a knowledge of anatomy.

Q. And your knowledge of anatomy is not based on any knowledge *or* medicine or dissecting or surgical work?

A. It is the knowledge of anatomy taken from a medical school, the same as any doctor studies.

Q. Now, Dr. Shipp, you get the alignment by putting—holding your finger on these two points of the back bone here?

A. Yes, sir.

Q. Isn't it sometimes the case that in the human body that these points may be more or less deflected?

A. You can find them by a bent spinous process.

Q. These process-, as you call them, are any of them straight?

A. They should be.

Q. I mean on this particular one——

A. Well, these are not protected by muscles and ligaments, that is a normal spine.

Q. So that in the normal spine these little things are twisted?

A. As a rule, they should be right in line.

Q. I say you find them in different bodies——

A. Why, sure, you can find them by bent spinous process. The nerve is sensitive. If the sensitiveness is not there you can prove that the nerve is impinged.

Q. How far in below the surface of Scarlet's back does that nerve come out of the back bone?

A. Ask that question again.

Q. How far below the surface of Scarlet's back, for instance does that nerve come out of the back bone?

A. Well, in comparison to the spine and to the depths of the flesh I would say something like an inch in the body. You can compare how far it is from the spinous process back to the opening through which the nerve passes.

76 Redirect examination.

By Mr. Fewell:

Q. You say you think you could adjust this condition of Joe Scarlet's backbone, spine?

A. Yes, sir.

Q. Now, your ability to do that and the time it would take you to do it would depend entirely upon the condition of the nerve being pressed upon?

A. It depends upon the pressure of that nerve.

Q. Now, that condition you find on the spine, what effect would that have on the scrotum or right here under my watch pocket?

A. Well, so far as the scrotum is concerned it would not affect that at all, but so far as the abdomen is concerned it would have a tendency to weaken that portion of the abdomen and small intestines.

Mr. Bozeman: What is the scrotum?

A. The scrotum is the bag for the intestines.

(Witness excused.)

J. J. STREET, (White), being first duly sworn, was produced and testified as follows, to wit:

Direct examination.

By Mr. Fewell:

Q. What is your occupation, Mr. Street?
A. Conductor.
Q. For what road?
A. New Orleans & Northeastern Railroad.
Q. Were you conductor of the train on which Mr. Joe Scarlet was injured?
A. Yes, sir.
Q. As the conductor, tell the jury what that train was composed of.
A. Well, I didn't have a full train for the two engines. I had twenty-seven loads and nine empties in the train.
Q. Twenty-seven loads and nine empties?
A. Yes, sir, little over between fourteen and fifteen hundred tons, I don't remember the exact tonnage.
Q. Where did you catch the train?
A. Out of Picayune.
77 Q. Where was this freight bound for, Mr. Street?
A. Meridian, that is, Meridian and north.
Q. Was any of it bound outside of Mississippi?
A. I suppose so, yes, sir.
Q. Where did it come from?
A. New Orleans.
Q. New Orleans, Louisiana?
A. Yes, sir.
Q. And you got it at Picayune and carried it to Meridian?
A. Yes, sir.

Cross-examination.

By Mr. Bozeman:

Q. Where did you take charge of the train that day?
A. At Picayune.
Q. And where did you leave it?
A. At Meridian.
Q. You were not with the train south of Picayune at all?
A. No, sir, the train was made up at Picayune and part of it came in there on different trains; it didn't all come in there together.
Q. The first personal knowledge you had of the cars was their being in the Picayune yard train?
A. Yes, sir.
Q. Have you got any personal knowledge as to where these cars came from to Picayune?
A. No, sir, I have not.
Q. Well, have you got any personal knowledge as to where they went after they got to Meridian?

A. Yes, sir, I have a record on my book that would show the final destination of the cars.

Q. You have a record showing the final destination?

A. Yes, sir.

Q. You mean on your train book?

A. Yes, sir.

Q. Have you got that train book with you?

A. Yes, sir.

Q. Where did you get that information as to its final destination?

78 A. From the waybills that accompany the cars to the destination.

Q. Who furnishes that to you?

A. The agents from where the car is billed or originates from.

Q. They give you waybills and you make a memorandum from them into your books?

A. Yes, sir.

Q. That is the only way that you know the destination of the cars?

A. Yes, sir.

Q. Does that information show you where the cars came from too?

A. No, sir, I don't keep a record of that, the waybills show it, but I don't keep a record of it.

Q. What do you do with these waybills?

A. I turn them over to the agent or yardmaster wherever I give up the train and deliver the cars.

Mr. Bozeman: We move your Honor to exclude the testimony of this witness as to the point of origin and destination of the cars of this train as not being the best evidence.

The Court: What do you say to that?

Mr. Fewell: Here is the record that he has got on which he handled these particular cars, and he says that he handled them outside of the state.

The Court: He has not introduced the record, has he?

Mr. Fewell: He has the record right there and Mr. Bozeman asked him about it.

Mr. Fewell: How many cars in that train on that date were shown to have contained freight destined outside of Mississippi?

Mr. Bozeman: We object to that as not being the best evidence.

The Court: Overruled. Let him answer the question.

To which ruling and action on the part of the Court, the Defendant, through counsel, then and there excepted.

Q. Go ahead.

A. Twenty-five cars, I have.

Q. Twenty-five cars destined to points out of Mississippi?

A. Yes, sir.

79 Q. Now, you don't know where they originated, do you?

A. Well, they originated in Slidell probably some of them, and New Orleans, coming up in different trains, you know, and then we make up our train and bring it out of there.

Q. Well, the train you make up is one made out of the cars brought in by the train from the south?

A. Yes, sir.

Q. You don't handle any local business on that train?

A. No, sir.

Q. And the train consists of just the freight that is brought in from the south?

A. Yes, sir.

Q. And you say some came from Slidell and some from New Orleans, and twenty-five cars bound for points outside of Mississippi?

A. Yes, sir.

The Court: I think that is sufficient, gentlemen. I overrule the motion.

To which action and ruling on the part of the Court the Defendant, through counsel, then and there excepted.

Cross-examination.

By Mr. Bozeman (continued):

Q. Was that the train that Mr. Scarlet here fired on when he got hurt that you have been talking about?

A. Yes, sir.

Q. Where was it that he was hurt?

A. Tallawa.

Q. How far is Tallawa north of Picayune, about?

A. It is thirty-two miles.

Q. What is the condition of the track at Tallawa as to grade?

A. It is a little up grade.

Q. Coming in which direction?

A. Coming north, just a little bit.

Q. Which track was this train standing on?

A. On the siding or passing track.

Q. Had the train stopped in the siding?

A. Yes, sir.

Q. Where were you riding on the train?

80 A. In the caboose.

Q. What was your first knowledge of the accident?

A. I felt the air go on. I felt the brakes go on on the train and I went on up to the head end to see what the trouble was. I immediately went on up and saw what the trouble was.

Q. When you got up there did you find Mr. Scarlet?

A. Yes, sir.

Q. Where was he?

A. He was lying down between two tracks, between the passing track and main line.

Q. Was he still between the train——

A. No, sir, he wasn't.

Q. Off the track?

A. Yes, sir.

Q. What did you do with him?

A. He stayed there until we got ready to pull out and I took him and put him on the caboose and brought him to Hattiesburg.

Q. That was what you call a double header?

A. Yes, sir.

Q. What was the number of the two engines?

A. 253 and 260.

Q. And who were the engineers in charge?

A. J. M. Smith on the 260 and Truehart Moore on the 253.

Q. Had you been running a double header as conductor before that?

A. Yes, sir.

Q. Did you come down on the same trip to Picayune that Scarlet came on?

A. Yes, sir.

Q. Was that a double header?

A. Yes, sir, the same engines.

Q. Well, had the 260, that is the engine in question, been used in double header service for any length of time before this within your knowledge?

A. Well, it had been used for sometime, I don't know for how long, but for sometime.

Q. Well, what was the capacity of these two engines 253 and 260 for double header service?

81 A. The tonnage rating?

Q. Yes, sir.

A. 1950 tons in all.

Q. Well, about how many tons did you have in the run?

A. Between fourteen to fifteen hundred, I don't know exactly how much. We did not have a full train.

Q. Well, what kind of trains had this 260 been pulling as a double header before that? Had it been pulling heavier and longer trains than this?

A. Well, yes, sir, we put full tonnage on them.

Q. Well, had you had any trouble with this 260 engine on these double headers?

A. No, sir.

Q. Had there been any breaking of the coupling apparatus before this, the king pin or anything of that kind?

A. I had not had any with it.

Redirect examination.

By Mr. Fewell:

Q. What is the capacity for one of these single engines?

A. 1950 tons.

Q. Well, when you double them you get greater capacity per engine than you would running single.

A. They add fifty tons to the engines.

Q. As I understand you, one of these engines' capacity is——

A. 950 tons, single.

Q. Now, when you coupled together you put on fifty tons more than they could carry single altogether, is that right?

A. Yes, sir.

Q. What if anything had been done by the company to strengthen the engines when they began to double head them?

A. No, sir.

Q. Didn't strengthen them at all, didn't they put on any appliances to strengthen these two engines when they doubled?

A. Same appliance they had on.

Q. Now, Mr. Street, don't you recall that the pilot of this engine was strengthened when they began to run it as double header?

A. No, I have not got anything to do with the engine or mechanical department.

82 Q. Well, you had something to do with the engine when you told Mr. Bozeman about the capacity?

A. Well, certainly, I have to get the tonnage rating.

Q. You don't mean to tell the jury that you had never noticed whether or not the company had strengthened these engines?

A. They could put some bolts.

Mr. Bozeman: We object to leading questions. This is his witness.

Objection sustained.

Q. Mr. Street, what if anything was placed on these single capacity engines when they were doubled up to make double headers out of them?

A. Well, nothing that I know of. The drawheads are taxed on the pilot to pull just as much as there is on the front end.

Q. As they were before they began coupling they were not sufficient on the front end of the pilot to do the double header work and therefore they fixed the pilots?

A. No, sir, the pilots are just like they have been.

Q. Well, what do they do to the coupler on the pilot?

A. Don't do anything, no more than they have been ever since I have been running a train.

Q. Weren't you there when they began to double heading?

A. Yes, sir.

Q. Well, do they make any changes in these engines at all when they begin to double head them?

A. I don't think they do. As far as I know, I think they are the same.

Q. Your idea is that the engines when they were coupled together to do double header service were in the same condition as they were to do single work?

A. Yes, sir, the drawheads have got to be as strong on the front end because it becomes necessary sometimes to move a train a short distance pulling it with the pilot from the coupler at one end and of course you have got to have it strong enough to pull the tonnage.

Q. Well, what makes one of these engines pull apart from the tender?

83 A. Different things.

Q. This one really pulled apart, didn't it?

A. No, sir, it was a broken pin.

Q. Well, didn't the engine run on eight or ten feet from the tender?

A. Yes, sir, when they parted they parted a few feet.

Q. Was there anything when you got up there and found the engine standing ahead of the train was there anything connecting the tank with the engine?

A. No, sir, they were pulled entirely apart.

Q. You said awhile ago that you felt the air go on, does it go on in emergency?

A. Yes, sir, when you break a coupler it applies the air.

Q. The exhaust of the air is what applies the brake?

A. Yes, sir.

Q. That is all.

(Witness excused.)

Mr. A. Martin, (White), being first duly sworn, was produced and testified as follows, to-wit:

Direct examination.

By Mr. Cameron:

Q. Where do you live?

A. Meridian, Mississippi.

Q. Do you know Mr. Joe Scarbe?

A. Yes, sir.

Q. Do you know where he lives, Mr. Martin?

A. Why he has been taking his meals at my house about four years.

Q. During that time, do you know of your own knowledge where he has been employed?

A. Yes, sir.

Q. Who with, please sir.

A. He was employed as locomotive fireman on the New Orleans & Northeastern Railroad.

Q. Were you at home or do you recall the occasion on which he is alleged to have been injured at Tallawa in 1915?

A. Yes, sir.

84 Q. Did you see him soon after that injury or not?

A. I don't remember, it was some two or three or maybe four days before he was able to get down to my house after he was brought to Meridian.

Q. Now, subsequent to that time, how often would you say you have seen him, Mr. Martin?

A. Why quite regularly, right along.

Q. Would he or not come to your house for his meals?
A. Well, sometimes he would be unable to come.
Q. Do you know why?
A. He complained to me of his back——

Mr. Bozeman: We object to anything Scarlet said to him.

Objection overruled.

To which ruling and action on the part of the Court, the Defendant, through counsel, then and there excepted.

Q. What did he say to you that led you to believe he was unable to come there?

A. I had asked him why he had not been in town and he said he was not able to get out, that he was suffering with his back and he would very frequently put his hand on his back while he was in pain.

Q. Well, how frequently would he do that in your presence?

A. Well, at short intervals.

Q. Can you give the jury any idea as to how long that expression of pain in your presence continued?

A. Well, ever since the boy got hurt.

Q. Ever since he got hurt?

A. Yes, sir.

Q. I believe you said you saw him quite frequently?

A. Yes, sir.

Q. Does he still live with you and take his meals at your house?

A. Yes, sir, he takes his meals at my house.

Q. What business are you in — Meridian?

A. Family grocery business.

Q. Where did you say that he complained of this pain hurting him?

A. In the small of his back.

Cross-examination.

By Mr. Bozeman:

Q. How long before this time was it that Scarlet had the rheumatism?

A. Why he had the rheumatism I think for maybe a couple of weeks prior to getting hurt and some doctor up town, I don't remember now, who was treating him, but they discharged him and said he was ready for duty.

Q. Wasn't it longer than two weeks that he was off? Wasn't he off about a month before he got hurt?

A. Well, it was not longer than three weeks I am satisfied. I don't remember the exact time, but two or three weeks, I think about two weeks though.

Q. How long was it that he was walking with a crutch on account of his rheumatism?

A. Why he used a crutch some seven or eight days, seven or eight days, I guess.

Q. And after that he walked with a stick?
A. Yes, sir.
Q. Now, that extended right up to the time he went out on this run, this first run he went on after that?
A. He abandoned the stick before he went to work.
Q. I say had he just gone back to work when he got hurt?
A. I think it was his first trip.
Q. And when he went back to work that trip he was still limping from the rheumatism?
A. Very little. I talked to him frequently about the rheumatism and he said——
Q. Don't tell what he said. And he has been boarding with you about four years?
A. Yes, sir, about four years.
Q. How far from your house is it to the place where he roams?
A. Three squares.
Mr. Cameron: During the time he was rooming with you, was he or not regular about his business?
A. Very steady fellow, sober.

The plaintiff here rested his case, whereupon the following
86 proceedings were had and entered of record, to-wit:

Mr. R. J. Simonds, (White), being first duly sworn, was produced and testified as follows, to-wit:

Direct examination.

By Mr. Boseman:

Q. Where do you live, Mr. Simons?
A. Meridian.
Q. How long have you lived there?
A. About twenty years.
Q. What is your business now?
A. Engineer.
Q. For the New Orleans & Northeastern Railroad?
A. Yes, sir.
Q. How long have you been locomotive engineer for the railroad?
A. Fourteen years.
Q. Continuously?
A. Yes, sir.
Q. What kind of service are you in now?
A. In freight and passenger.
Q. Do you remember about the time that Mr. Scarlet was hurt?
A. Yes, sir.
Q. Last September?
A. Yes, sir.
Q. Did you know Mr. Scarlet before that?
A. Yes, sir.
Q. And since then?
A. Yes, sir.

Q. What connection had you had with him before he was injured?

A. He fired for me about two months.

Q. What engine were you running then?

A. 260, regular.

Q. Now, what kind of trains had you been pulling with the 260 during that time?

A. Double headers.

Q. About how many cars in this double header had you pulled up to that time with the 260.

A. Well, it differed. Sometimes we would have ten cars
87 and then again it would run as high as sixty-five or sixty-eight cars.

Q. Now, had you had any trouble at all during that time with the 260 with reference to the coupling apparatus between the engine and the tank?

A. No, sir.

Q. Had you during that time or not observed any trouble with the king pins or coupling between the engine and tank or any of the coupling apparatus?

A. No, sir.

Q. Had you during that time or not observed any trouble with the king pins or coupling between the engine and tank or any of the coupling apparatus?

A. No, sir.

Q. Do you remember when was the last trip you made with the 260 before this accident?

A. I won't say positive, but I think it was two mornings before this accident, went into Meridian two mornings before the accident.

Q. From the south to Meridian?

A. Yes, sir.

Q. Were you on this train when Scarlet was hurt?

A. No, sir.

Q. Do you know engine 253?

A. Yes, sir.

Q. What kind of an engine is that in comparison with the 260?

A. Same engine exactly.

Q. Just different numbers?

A. Different numbers, but the same engine.

Q. Well, now from your experience in operating trains and pulling double headers with this engine what would you say about the capacity of these two engines, 253 and 260, to pull a train of thirty or thirty-five cars with a tonnage of fourteen or fifteen hundred tons?

A. Do it easy.

Q. Had Mr. Scarlet been working regularly with you just prior to his injury?

A. He did up until about—he worked I suppose two months regular with me and then got off and went for about four or five
88 weeks before the injury——

Q. What was the matter with him?

A. He told me it was rheumatism.
Q. Did you see him during that interval?
A. Yes sir.
Q. How was he walking, going about?
A. He limped, used a stick.

Cross-examination.

By Mr. Fewell:

Q. Scarlet was a good fireman, wasn't he, Ross?
A. Very good, yes, sir.
Q. And you say that with fourteen or fifteen hundred tons these two engines coupled together could have pulled with ease?
A. Handled with ease.
Q. But they didn't handle it, did they?
A. Did when I ran them.
Q. But it is a fact that this 260 broke apart, the engine and tank?
A. I don't know anything about that, I am talking about when I ran them.
Q. If, as a matter of fact, engine 260 and the tank came apart it didn't pull that fourteen or fifteen hundred tons?

Mr. Bozeman: We object to that, it is just argument.
The Court: I think so, too. Objection sustained.

Q. What would cause a locomotive engine and tender to break apart?
A. King pin break is about the only thing I know, or come out.
Q. Well, it has got a king pin and a couple of safety chains between the engine and tender.
A. Safety chains are merely put there in case chain would break when running light.
Q. So that the chains would keep them from going apart.
A. That is when the engine is running light is in my opinion is what the safety chains are put on there for.
Q. Don't the law require safety chains to be put on these engines?

Mr. Bozeman: We object to that. It is a question of law.

Objection sustained.

Q. Your idea is that all that is necessary to keep the engine and tender is the king pin?
89 A. Yes, sir, for the purpose of——
Q. What could cause a king pin to break?
A. I can't answer that question.
Q. Well, you have been railroading a good many years?
A. Yes, sir.
Q. And been double heading two years and you can't tell the jury what would cause the safety chain to break between the engine and tender?

Mr. Bozeman: We object to that as being incompetent and immaterial.

Objection overruled.

To which ruling and action on the part of the Court, the defendant, through counsel, then and there excepted.

A. Only thing I can tell you, iron is not infallible and is liable to break.

Q. Did you ever see this king pin between the engine and tender of 260? Do you know what became of it after it broke?

A. No, sir.

Q. Mr. Stroble, isn't it the duty of the engineer to inspect link pins between the engine and tender, is it?

A. It is.

Q. It is?

A. Yes, sir.

Q. Isn't it the fireman's duty also?

A. No, sir.

Q. Well, when would he make those inspections?

A. At the end of each run.

Q. Do you know whether that inspection was made of this king pin at the time of this accident?

A. I know it was made before the engine went out of here.

Q. How do you know that?

A. I made it myself.

Q. And you found what ?

A. Found the king pin all O. K.

Q. Did you find the chains all O. K?

A. Yes, sir.

Q. What could make these two safety chains as they are referred to break?

90 A. 1450 tons behind them.

Q. That is what I have been trying to get at all the time. You had two of the ordinary type of light engines?

A. Yes, sir.

Q. Those engines were, as a matter of fact, built to pull single trains with a tonnage of 950 tons, is that true?

A. I suppose they belong to the company, they could put three or four on the train if they wanted to.

Q. The capacity of these single engines was 950 tons?

A. It was.

Q. And when you double up you put more than 950 tons an engine on them?

A. I take that back. The tonnage of a single train is ten hundred tons single.

Q. At what time?

A. At the time of this trouble.

Q. Ten hundred tons?

A. Yes, sir, tonnage was raised to ten hundred tons at that time.

Q. How long before this accident had they raised the tonnage?

A. Two months, I guess, six weeks or two months.

Q. Now, these engines had stood the strain all right at 950 tons?
A. Yes, sir.
Q. And they put it to 1050, did you say?
A. Ten hundred.
Q. Ten hundred tons on them just a short time before this accident?
A. Six weeks or two months.
Q. And then it was that this accident happened?
A. How is that?
Q. Then it was that this engine tank pulled apart, after that?
A. Yes, sir, after the tonnage was raised.
Q. You say you have pulled as much as 65 or 68 with these double headers?
A. Yes, sir.
Q. What would be the tonnage of sixty-five cars made up of the ordinary train?
A. Mixed with loads and empties it would not be full tonnage.
Q. If it was full tonnage and they did try to pull it some-
91 thing is liable to break?
A. We would set out some of them and reduce to right tonnage after we had figured the tonnage.
Q. How long had the 260 been in the company's service?
A. I don't know, I don't remember that.
Q. Well, approximately, you had used it about two years, had you not?
A. Do you mean since they brought it from the manufacturer?
Q. Yes, sir?
A. As well as I remember it was 1905 or six that they came.
Q. And it was put right into service?
A. Yes, sir.
Q. And it continued in service except for ordinary repairs and shop work up to the time of the accident?
A. And is still in the service.
Q. What if anything was put on these engines by way of additional equipment for double header work?
A. Double header air and end sill.
Q. Do you mean the pilot and rear of the tender?
A. The end sill of the pilot.
Q. What do they put on the front end of the pilot?
A. Put sheet iron and behind the end sill.
Q. What was that for?
A. To strengthen it.
Q. That was to keep them from pulling loose?
A. To keep them from breaking the end sill.
Q. They didn't, as a matter of fact, put any additional equipment between the locomotive and tender, did they?
A. Not as I know.

Redirect examination.

By Mr. Bozeman:

Q. When this engine was put in the double header service was any change made in the king pin?

A. No, sir.

Q. Well, as long as you ran it in the double header service, after it was put in there, was there any breakage of the king pin?

A. No, sir.

92 Q. Or any trouble of that kind?

A. No, sir.

Q. The same king pin that had been used in the single service was used in the double header?

A. Yes, sir.

Mr. Fewell: This engine 260 was run as the lead engine all the time that you were running?

A. Yes, sir, when I ran it.

Mr. Bozeman: Why was it?

A. The oldest man when double heading always runs the lead engine.

Q. Was there any difference on the strain on the king pin on the lead engine on the double header and the king pin in the second engine of the double header?

A. No, sir.

Q. That is all.

(Witness excused.)

Mr. J. M. SMITH (White), being first duly sworn, was produced and testified as follows, towit:

Direct examination.

By Mr. Bozeman:

Q. Where do you live?

A. Meridian.

Q. How long have you lived there?

A. About thirteen years.

Q. Are you connected with the New Orleans & Northeastern Railroad?

A. Yes, sir.

Q. In what way?

A. Engineer.

Q. How long have you been locomotive engineer?

A. About nine years and four months.

Q. How long have you been locomotive engineer for this railroad?

A. About nine years and four months.

Q. Your whole service was on the Northeastern?

A. Yes, sir.

Q. Was that service in the freight service?

A. Yes, sir.

Q. Were you engineer on this engine number 260 the night
93 that Mr. Scarlet got hurt?
A. Yes, sir.
Q. Where did you take charge of that train?
A. Picayune.
Q. What engine was that?
A. Engine 260.
Q. You took charge of it at Picayune?
A. Yes, sir.
Q. What was the last trip you made on this engine before this?
A. Well, I went into Picayune on this engine.
Q. From where?
A. From Meridian.
Q. And how long did you lay over in Picayune, Mr. Smith?
A. Well, I don't remember, we had to stay there as much as nine hours.
Q. Was the 260 used at all on the road after you brought it into Picayune and before you started back?
A. No, sir, no more than the hostler taking it up to and from the chute.
Q. Is it the duty of an engineer to inspect his engine at the end of his trip?
A. Yes, sir.
Q. Did you inspect the 260 on that day that you got to Picayune?
A. Yes, sir.
Q. Did you inspect the coupling apparatus between the engine and tank?
A. Yes, sir, we always look between them and the pins. I didn't take the pin out, but I inspected it and looked at it.
Q. Did you examine the pin?
A. Yes, sir.
Q. What was its condition?
A. All right.
Q. Had you had any trouble with it on the trip down to Picayune?
A. No, sir.
Q. What kind of train did you pull down there with the 260?
A. About 1900 tons, 18 or 1900, I don't remember exactly.
94 Q. Was there any engine except the 260?
A. Yes, sir.
Q. What?
A. 253 to the best of my recollection.
Q. Double header?
A. Yes, sir.
Q. And which was the lead engine?
A. 253.
Q. And 260 the second engine?
A. Yes, sir.
Q. About nineteen hundred tons, did you say?
A. Something like that.
Q. Did you have any trouble at all with the king pin between the engine and tank or the coupling apparatus at all?

A. Did not.

Q. Now, when you started back on that trip, how was the 260 on the return trip to Meridian, how was it, you say, was it in double header?

A. Yes, sir.

Q. First or second engine?

A. Second engine.

Q. Who was on the head engine?

A. Mr. Truhart Moore.

Q. Where was it that this accident happened?

A. Tallawa.

Q. That is between Picayune and Hattiesburg?

A. Yes, sir.

Q. Just tell what you were doing with the train at the time your engine and tank pulled apart?

A. We were starting the train.

Q. Where had you stopped?

A. We had stopped just in the clear of the south switch.

Q. What track were you on?

A. On the passing track.

Q. Headed north?

A. Headed north.

95 Q. How far would you say your engine went after they pulled apart?

A. About six or eight feet.

Q. Did you see Mr. Scarlet when he fell?

A. Why I saw him as he fell.

Q. What were you and Truehart Moore doing with the engines at the time that they pulled apart?

A. We were starting the train.

Q. Well, how were you handling them?

A. Well, we just gave them steam in the usual way.

Q. Well, was there any jerking or sudden jerking of the train?

Mr. Fewell: We object to leading his witness.

Q. Just go ahead and tell the jury how you start off with a double header.

A. Well, the man on the leading engine always starts first by getting the slack and the second man always assists him gradually, just gradually gives him a little steam until they get the train started.

Q. Was that the way you were doing it when this accident happened?

A. Yes, sir.

Q. Had your attention been att-acted in any way on the trip from Picayune to the king pin or coupling apparatus between your engine and tender?

A. No, sir.

Q. Had you had any trouble with it of any kind?

A. No, sir.

Q. How do you determine the capacity of an engine?

A. Why, by traction force and steam pressure.
Q. Does the size of the king pin and coupling have anything to do with the capacity of an engine?
A. I think not.

Cross-examination.

By Mr. Fewell:

Q. You say in starting off a double header the front engine takes the slack out of the train?
A. Yes, sir.
Q. Well, suppose you had more tonnage than one engine would move what would you do?
A. Well, you would have to assist him if he had done all he could do.
96 Q. Well, suppose you had a fourteen or fifteen hundred ton train, these engines were all alike——
A. 950 tons each.
Q. Are you certain now it was 950 tons?
A. That is what they were rated at at that time.
Q. Aren't you mistaken about that?
A. I think not.
Q. Isn't it a fact that they were ten hundred tons at that time?
A. Well, I don't know.
Q. I thought you said it was 950 tons?
A. I said about that, the tonnage has been raised before or since that time.
Q. But you do remember examining this pin at Picayune on that occasion?
A. Yes, sir.
Q. You don't remember whether the tonnage had been raised at that time or not?
A. No, sir.
Q. In the movement of this double header the front engine takes the slack out of the train and you assist him?
A. I said if he can start it.
Q. Well, had it started on that occasion?
A. Yes, sir, they didn't have a full train.
Q. Didn't they have fourteen or fifteen hundred tons?
A. That is not like nineteen hundred.
Q. Well, fourteen or fifteen hundred tons is more than a full train.
A. But we had two engines.
Q. Didn't you tell the jury that the front engine took the slack out?
A. I said if he could.
Q. You don't think you said that?
A. No, sir.
Q. Didn't you say that the front engine started and took the slack out of the train?
A. So far as he could.

97 Q. Well, do you recall that he couldn't get the slack out of the train?

A. No, sir.

Q. Well, do you recall that he did get the slack out of the train?

A. He got all he could, I suppose.

Q. Then you eased along with it?

A. Yes, sir.

Q. Then you undertook that with about fourteen or fifteen hundred tons?

A. Something like that.

Q. What is your engine's weight?

A. About 73 tons.

Q. So that the front engine had to move your engine too?

A. Well, certainly, my engine is coupled to him and he had to move that first.

Q. Now, the front engine had to get your engine in motion and the balance of the train, is that right?

A. Get it started.

Q. Well, that is to start the motion?

A. That is all right. Well, now, listen—how much slack would be in thirty-five cars?

Q. I am not on the witness stand. You are produced to testify.

A. All right——

Mr. Bozeman: Let him explain.

Mr. Fewell: I will give him an opportunity to explain.

The Court: Go ahead.

Q. Now, he had in fact started this train with this one engine on that occasion?

A. Yes, sir.

Q. Now, that front engine, its capacity was from 950 to 1,000 tons, wasn't it?

A. Why, right around 950, yes, sir.

Q. *How*, he undertook to move 1,500 tons?

A. Yes, sir.

Q. Train with 75—what did you say?

A. About 73.

Q. About 73 ton engine?

98 A. Yes, sir.

Q. Now, you tell the jury that the size of the link pin has nothing to do with the engine and tender sticking together?

A. I didn't say——

Q. Why don't you put a twenty-penny nail in that coupling?

A. It might do just as well.

Q. You tell the jury that a twenty-penny nail would do just as well?

A. That is figuring on the traction pressure or steam.

Q. You tell the jury that a twenty-penny nail would do just as well on that coupler on that tender so far as the movement of the train is concerned?

A. Why, of course, it would not hold on much, of course.

Q. Well, now the larger the link pin in there the more it would hold?

A. Well, I don't know, it is according to what kind of material it was.

Q. Well, you had good material?

A. Yes, sir.

Q. You don't know whether it was made up of steel or of iron?

A. It looked like iron.

Q. Don't you know whether it was made of iron or not?

A. No, sir.

Q. Was it made of wood?

A. It looked like iron, it was not wood, I know.

Q. And this inspection you gave that pin at Picayune was just enough for you to say that it looked like iron?

A. It was iron.

Q. Well, didn't you lift that pin to see whether it was broken?

A. You couldn't see it.

Q. Then the only way to see whether the pin was broken or not was to take it out?

A. It is not inspected——

Q. That is not answering my question. The only way to see whether it was cracked in the middle——

99 A. Possibly it would be cracked and possibly it would not be.

Q. The only way you could see that pin was cracked was to take it out?

A. Yes, sir.

Q. And you didn't take it out?

A. No, sir.

Q. Did you know that engine had been subjected to the strain of hauling a train of sixty or sixty-five cars?

A. Yes, sir.

Q. Well, that is more than the tonnage——

A. It is according to what they weigh.

Q. You don't generally haul empties over the Northeastern on that train?

A. No, sir, not on that particular train.

Q. You generally have it pretty well loaded, don't you?

A. Yes, sir, ordinarily speaking.

Q. Now, Mr. Smith, you knew that the ability of this engine to pull the tonnage of this train rested entirely upon that king pin, didn't you?

A. Well, there is safety chains there.

Q. Well, did you inspect the safety chains?

A. Yes, sir.

Q. They were in entirely proper order?

A. Yes, sir.

Q. And yet the safety chains, two of them broke?

A. No, one of them pulled in two where it was welded.

Q. Oh, you had a welded chain on there?
A. Yes, sir.
Q. Which one was that, on the right side or left hand?
A. I don't remember.
Q. You inspected it through and you don't remember where it was?
A. I don't remember which side it was.
Q. Well, do you remember which link it was in the chain?
A. I don't remember which one it was. It was on a grade when they pulled aloose from the tank.
Q. Well, how much of the chain that pulled in two was left on the tank?
100 A. There is only two links.
Q. Just two links between the engine and tank?
A. There is a chain of the length of two links.
Q. What sort of metal is that made of?
A. Made out of iron.
Q. Well, what size?
A. Looked like half or three-quarters of an inch.
Q. Now, this engine and tender were coupled with two chains of two links each, each link being a half to three-quarters of an inch?
A. Yes, sir, something like that.
Q. Now, one of these broke in two, didn't it?
A. Yes, sir, where it was welded.
Q. Who welded it?
A. I have no idea, blacksmith, I suppose.
Q. It was not welded good——
A. It was liable to break anywhere else.
Q. It didn't break anywhere else, did it?
A. No, sir.
Q. And the other pulled out?
A. Yes, sir, the other pulled loose from the tank side.
Q. How was it fastened to the tank side?
A. It is kinder like that, goes through link and bolts to the tank by two bolts.
Q. Now, what pulled loose?
A. It is fastened to the wood and I think it sheared the bolt off and pulled them out of the wood.
Q. Well, did you examine this place where this chain pulled out the night before?
A. Yes, sir.
Q. And it was in good order at that time?
A. It looked all right.
Q. How was this piece of iron fastened there to which the chain was attached?
A. It is welded of iron and there is a kind of hook and it is put on to the tank and bolted through, up and down in the sill.
101 Q. And one of those bolts tore up?
A. And one sheared off.
Q. That was on one side?
A. Yes, sir.

Q. Do you know how long that chain had been welded?
A. No, sir.
Q. Now, where this link pin goes through, explain to the jury—let's assume that this is what you want to fasten together now and, if you can, imagine that that is the same size of the engine and tender, there was no flat piece of steel like that fastening that engine down there, was there?
A. No, sir.
Q. Well, what sort of steel was it?
A. About two and a half or three inches, or three and a half, something like that, I don't know exactly the diameter, there was a hole in each end and this pin goes right down through the tank.
Q. What holds that in?
A. There is a pin.
Q. So the coupler did go with the engine, didn't it?
A. Yes, sir.
Q. Now, did the pin fit right on top of that?
A. Yes, sir.
Q. And you just went there and inspected the head of it?
A. No, sir .
Q. What did you do?
A. We inspected from the under side.
Q. Did you get down under there to look?
A. Didn't have to——
Q. Well, how did you see it?
A. Just walked up there and looked.
Q. You just walked up and peeped?
A. Yes, sir.
Q. Is that the full inspection?
A. When the pin hangs straight down, it is bent, it would be curved.
102 Q. The end that had nothing to do with the drawbar would be curved?
A. If it was not bent it would hang straight down.
Q. What was it that came in contact with that pin and cause- it to bend?
A. Well, the stress in between them.
Q. Well, did you just tell us that the stress in between them would have no effect on that pin?
A. This goes in this way, the thing is fixed to stay, you understand.
Q. Well, it did stay that way until it broke, didn't it?
A. Yes, sir.
Q. Now, you don't mean to tell the jury that the pin that held the engine and tank together compared to the size of the engine and tank like this little hook does?
A. No, sir.
Q. You say that was a piece of metal how wide?
A. About two and a half or three and a half.
Q. Piece of metal about something like the top of this rail?
A. Little bit wider than that, I believe.

Q. And about two and a half inches thick?

A. Just about, yes, sir.

Q. And that was the inspection you spoke of when you told Mr. Bozeman you inspected it at Picayune, that you went down there and just stopped and peeped down there and saw everything and assume that it was all right, that is what you meant?

A. That is what I meant, yes, sir.

Q. You didn't go in there and lift this pin and try to get it out and see whether it was cracked or anything of that kind?

A. No, sir.

Q. Well, did you take hold of this chain?

A. It was not necessary.

Q. Well, you saw where it was welded?

A. I saw where it was welded after it was broke in two.

Q. Didn't you see where it was welded in Picayune?

A. No, sir.

103 Q. Well, you inspected it?

A. No, sir, you couldn't tell it from the outside. You see where the links come together it is welded together and you couldn't well see it.

Q. And you don't know who welded it?

A. No, sir.

Q. Right after it broke you found that place where it was welded?

A. Yes, sir, and I knew it broke. I knew it broke where it was welded. There was no defect in it.

Q. There was no defect in it?

A. It was a clean break.

Q. Right where it was welded?

A. Yes, sir.

Q. And that is what you call a clean break is where a thing breaks loose——

A. It didn't pull apart but broke in two.

Q. It may have been welded that way, wouldn't it?

A. I don't know.

Q. Now, Scarlet was attending to his business at that time?

A. He was, yes, sir.

Q. Where was he standing in the deck of the train?

A. I think he was putting in fire, he was standing over the apron.

Q. Were you watching Joe or watching ahead?

A. I was watching out for the train.

Q. The front engine gives the signals and answers signals?

A. Yes, sir.

Q. You had nothing to do with that?

A. Only to assist him.

Q. You had nothing to do with looking out ahead?

A. I have got plenty to look out for.

Q. And you were watching Joe?

A. I was not.

Q. I thought you said——

A. He was putting in fire, but I was not looking at him.

Q. You just know from the ordinary impression that he was fixing to put coal in the fire?

A. Yes, sir.

104 Q. Now, when these things pulled apart everything pulled apart?

A. Yes, sir.

Q. Had some air hose under there?

A. Yes, sir.

Q. Your brake valves were not working at all on that occasion, you had that cut out and the front engine applied and controlled the air?

A. Yes, sir.

Q. How many air hose were there?

A. Three.

Q. What is the size of those?

A. About an inch or inch and a quarter.

Q. What are they made out of?

A. Made out of rubber and cast iron.

Q. Well, they were broken apart?

A. The hose came uncoupled.

Q. Where did the hose hang?

A. On both sides, they are fastened to each one and coupled in the center.

Q. The air hose jump- about a great deal from the exhaust of the air?

A. I never have really noticed, but it is supposed it would do it.

Q. What did you do when it pulled apart?

A. I jumped down to pick that man up.

Q. What had he struck?

A. He had struck that drawbar.

Q. You saw him fall on the drawbar?

A. I saw him falling, but didn't see him when he started to fall.

Q. Well, there was not anything to fall on?

A. That and the ground and the ties.

Q. Well, he fell on all three of them?

A. I couldn't tell you.

Q. What did you do with him?

A. I put him on the side of the track and taken the caboose and taken him to Hattiesburg.

105 Q. How long has Joe fired for you?

A. Oh, well, that was the first trip right then—he has fired off and on for me for the last two or three years.

Q. That is all.

Redirect examination.

By Mr. Bozeman:

Q. All links of a chain have to be welded, don't they?

Mr. Fewell: We object to that as leading.

The Court: Objection sustained. Don't lead the witness.

Q. How is a chain made? Do you know how they get the different links in?

A. They must be welded, Mr. Bozeman.

Q. How high was it from the deck of the engine where Scarlet fell down to the track?

A. Well, I would imagine it to be about three feet, I would imagine.

Q. When he was falling did you see him, what position he fell in, whether backward or forward or on the side?

A. He fell kind of forward, he kind of slipped off of the tank.

Q. Did you see him strike anything as he went down, could you tell whether he hit anything or not?

A. I think he hit that drawbar, I am pretty sure he did.

Q. Did the drawbar when this king pin broke back here, you say, which was it, king pin on the engine or which?

A. On the tank side.

Q. What became of the drawbar when the pin broke?

A. The drawbar stayed with the engine part.

Q. Where did the apron——

A. It dropped down as far as it could go, for the links held it to the engine.

Q. Was it fastened on the engine?

A. Yes, sir, on the engine.

Q. How far did your engine pull away from the tank?

A. Six or eight feet.

Q. Did it pull this drawbar with it?

A. Yes, sir.

Q. Did you have any talk with Mr. Scarlet on that trip about his rheumatism?

A. Yes, sir.

106 Q. What did he say about it?

A. Well, he said he had been feeling pretty bad with it, but was getting along very well at that time.

Q. Did he say anything about laying off at that time on account of it?

Mr. Fewell: We object——

Q. Did he say anything else about what I have asked you about?

A. Did he say anything else?

Q. Yes?

A. I don't know particularly, only he asked me to let him work the injector in order to get up and down. You see, there is only two steps about eighteen inches high. He wanted me to let him work so he could get up and down as much as possible to limber that leg up. I offered to fire for him when we got to Picayune, but he said, "No, it does me good."

Q. Standing by your engine when you get off it and at the end of the run and looking under it, can you see all of this pin and links and stuff under there?

A. Yes, sir, stooping over, yes, sir.

Q. Now, engine 253, that was the head engine, was it?

A. Yes, sir.

Q. What kind of engine was that as compared with the 260?
A. About the same class engine, considered the same class.
Q. Now, about the king pins in these two engines, do you know whether they were the same or not?
A. Yes, sir, I suppose so.
Q. Well, when the 253 pulled this train, started to pull this train, take the slack out of it there at Tallawa, did the king pin on the 253 break?
A. No, sir.

Recross-examination.

By Mr. Fewell:

Q. Had you started to working your steam on your engine when the thing broke?
A. Yes, sir.
Q. You had just started?
A. Yes, sir.
Q. Had just applied your steam?
107 A. Just moving along.
Q. The train didn't move any distance hardly, did it?
A. I suppose it moved eight or ten feet.
Q. Where is that link pin that broke?
A. Where is the link pin?
Q. Yes, sir.
A. I have no idea.
Q. Well, you saw it broken?
A. Yes, sir, I took the broken pieces to the shop. That is all I had to do with it.
Q. Well, did you take the broken pieces of this link pin to the shop?
A. Yes, sir.
Q. Did you take the broken pieces of this chain to the shop?
A. Yes, sir.
Q. Do you know who has got it?
A. No, sir.

Redirect examination.

By Mr. Bozeman:

Q. Where was the king pin broken?
A. About even with the top of the drawbar.
Q. Then what became of the lower part of the pin?
A. It fell to the ground.
Q. What part was it that you picked up?
A. The top part, the piece that we had to get out of the tank.
Q. Do you know what became of the lower part?
A. No, sir, it fell to the ground, I didn't look for that.

(Witness excused.)

Mr. TRUEHART MOORE, (White), being first duly sworn, was produced and testified as follows, to-wit:

Direct examination.

By Mr. Bozeman:

Q. Your name is Truehart Moore?
A. Yes, sir.
Q. Where do you live?
A. Meridian.
Q. What is your business?
A. I live at Meridian, I am living at Picayune now.
Q. What is your business?
108 A. Locomotive engineer.
Q. For what railroad?
A. New Orleans & Northeastern Railroad.
Q. How long have you worked for that road as locomotive engineer?
A. Eleven years.
Q. In what service.
A. Train service.
Q. I mean freight or passenger?
A. Freight.
Q. Were you on this double header train on the night that Scarlet was hurt at Tallawa?
A. Yes, sir.
Q. What engine were you on?
A. 253.
Q. What kind of engine is 253 as compared with the 260?
A. They are both identically the same class.
Q. What was the position of the 253 and the 260 in the train?
A. They were coupled together.
Q. Which was the lead engine?
A. 253.
Q. Then you were on the lead engine?
A. Yes, sir.
Q. Had you gone down to Picayune on the 253?
A. Yes, sir.
Q. When?
A. The night previous.
Q. What kind of train did you pull down?
A. We pulled a train with two engines.
Q. Well, was the 260 in that train also?
A. Yes, sir.
Q. Now, what were you doing when this accident happened?
A. Pulling through the side track at Tallawa.
Q. What was the first information you had that anything had happened?
A. The brakes applied.
Q. Well, how fast were you moving at the time your engine——
A. Just barely was moving.

109 Q. Had you stopped at Tallawa?
A. Yes, sir.
Q. What track were you on?
A. We was in the sidetrack.
Q. Had you met a train there?
A. Yes, sir.
Q. Coming in what direction?
A. Coming north.
Q. What was the condition of the track there, Mr. Moore?
A. It is just an ordinary side track, it is slightly up grade.
Q. What was the condition as to being in good condition or not?
A. So far as I know it was all right.
Q. Just explain to the jury how you start these double headers.
A. We start off with a double header—the man on the lead engine starts off a little in advance of the man on the second engine in order to pull the slack out gradually and not handle the train too hard and then the second man assists after *we* gets started.
Q. Were you doing that on this occasion when Scarlet was hurt?
A. Yes, sir.
Q. Well, the king pin in the 253, that goes through the coupler bar or draw bar, what sort of pin is that as compared with the same pin on the 260.
A. Both the same.
Q. Did you have any trouble with that king pin on that occasion with the 253?
A. No, sir.
Q. Or did you coming down?
A. No, sir.
Q. That is all.

Cross-examination.

By Mr. Fewell:

Q. Did you see the pin that broke on the 260, on the engine when it pulled apart?
A. Yes, sir.
Q. Where did you see it?
A. At Tallawa.
Q. What became of it?
A. I think it was brought to Meridian.
110 Q. Did you see all of it.
A. No, just part of it.
Q. That was the top or bottom of it?
A. Top of it.
Q. Did you undertake to find the other part of it?
A. No, sir, I didn't.
Q. If I understand you correctly you stated that the front engine starts a little ahead of the second engine?
A. Yes, sir.
Q. So as to get the slack out and then the other fellow begins to helping?

A. Yes, sir.
Q. Do you remember what tonnage you had on that train?
A. The train in question?
A. Yes.
A. About fourteen hundred tons, I think.
Q. Between fourteen and fifteen hundred tons?
A. Yes, sir.
Q. What was the capacity of one of those engines?
A. Engine of this——
Q. Yes, sir, one engine?
A. 950 tons, north.
Q. Well, hadn't they raised the capacity of these engines to a thousand tons?
A. No, sir.
Q. You are certain about that?
A. No, sir, I am running one now.
Q. And they still have that capacity of 950 tons?
A. 950 tons and 900 tons south.
Q. Nine——
A. I beg your pardon, I believe the tonnage has been raised.
Q. Well, what about it now, what is the capacity of one of them single?
A. They raised and lowered it once or twice. I don't know whether they have got it back to 950 now or not.
Q. Now, Mr. Moore, what is the capacity of these two engines of that class coupled together as double header coming north?
111 A. 1950 tons.
Q. That is the full capacity?
A. Yes, sir.
Q. What if anything has been done by the railroad company to strengthen the connections between the engines, the drawbars and the king pins, etc. on these light engines in order to put them into double header service?
A. Well, there has been some strengthening done, but I don't know whether it was done to put them in double heading. I think it was done before they started double heading, they put some new pins in them.
Q. Do you know whether they put a new pin in the 260?
A. I don't know.
Q. What have they done with reference to the front end of the pilot of these light engines in order to use them in double header service?
A. I think they put some kind of brace from the pilot to the drawhead.
Q. What was the purpose of that?
A. To strengthen.
Q. To stand the strain of this extra heavy load?
A. I suppose so.
Q. How come them to have to strengthen these engines, do they have any trouble about them pulling apart or anything of that kind?

A. Not very often, no sir.
Q. But sometimes that was true?
A. Anything will happen sometimes.
Q. Isn't it a fact that before they strengthened these connections that the New Orleans & Northeastern Railroad had pulled your pilot off of one of these locomotives of that class?
A. That is a fact.
Q. It is a fact?
A. Yes, sir.
Q. Do you know whether or not they undertook to strengthen the connection of the engine between the engine and tank in addition to new pins put in there?
A. No, sir.
112 Q. What was the condition of your track that night?
A. It was all right.
Q. It was all right—did the engine slip at all when you started?
A. No, sir.
Q. I believe you stated that the first thing you knew was your air went on in emergency?
A. Yes, sir.
Q. When the air hose breaks anywhere in the train line both ends go on automatically?
A. Yes, sir.
Q. That is what directed your attention?
A. Yes, sir.
Q. That is what directed your attention?
A. Yes, sir.
Q. Did you get off your engine to go back there?
A. Yes, sir.
Q. What part of the coupling device was on the engine and what part on the tender?
A. The coupling bar was on the engine.
Q. Well, was anything else broken there?
A. One of these safety chains was broken.
Q. Do you recall which one it was?
A. I think it was on the left side.
Q. Was that the one that was welded?
A. Yes, sir.
Q. Broken right in the weld, was it?
A. Yes, sir.
Q. Do you know how long it had been welded?
A. No, sir.
Q. What about the other one, the other safety chain?
A. The other pulled loose from the sill on the tank.
Q. Well, how did it pull loose?
A. Bolts broke.
Q. And where was the long end of that hanging, whether to the locomotive or tender?
A. Locomotive.
Q. What else was broken there?
A. Tank hose was pulled loose.

Q. What made that engine break apart?

113 A. I couldn't say.

Q. Well, how long have you been railroading?

A. Thirteen or fourteen years.

Q. And in the starting of this train this engine and tender pulled apart?

A. Yes, sir.

Q. And you can't tell the jury what made it break apart?

A. No, I could contribute different things to it.

Q. Well, what could you contribute to it?

A. I couldn't say. I don't know what it was broke it.

Q. Haven't you had them to break with you?

A. No, sir.

Q. Haven't you seen them break apart?

A. Yes, sir, I have seen them but never did pay enough attention to find out.

Q. And so you can't tell the jury what caused this engine and tender to break apart?

A. No, sir.

Q. Where was Joe when you got back there?

A. He was laying down in the track when I got there.

Q. Was he groaning?

A. Yes, sir, he seemed to be in pain.

Q. Seemed to be in considerable pain?

A. Yes, sir.

Q. What did you all do with him?

A. As soon as we got the engine we pulled up and had him put on the caboose.

Q. You didn't run over him to——

A. After I got back they had him lying to the side on the main line.

Q. He was lying between the rails of the main line?

A. Yes, sir.

Q. You are certain about that?

A. As well as I remember, yes, sir.

Q. Isn't it a fact that he was lying between the side track and the main line and in the clear?

114 A. He couldn't hardly have been lying down there on account of the elevation of that roadbed in there, it was a very uncomfortable position to lay in.

Q. He was in an uncomfortable position apparently?

A. He was uncomfortable for laying——

Q. And he was in an uncomfortable position apparently?

A. Well, yes, sir, from all indications he was.

Q. When you got back there did you help pick him up or go with him to the caboose?

A. No, sir.

Q. Who did?

A. I think that the conductor and train crew did.

Q. Did you take him on that train?

A. No, sir.

Q. You didn't stay with him back in the caboose?
A. No, I had to pull up the train.
Q. How did you pull your train on in?
A. We fixed the drawbar between the engine and tender.
Q. How did you fix it?
A. Put another pin in.
Q. Do you know what the size of this pin that broke was? They have different size pins, don't they?
A. About two and a half inches.
Q. They have different size pins on the New Orleans & Northeastern don't they?
A. I don't know whether they have or not.
Q. Don't you inspect the pins on the engine every time you take them out?
A. I look at them but I don't take a rule and measure them.
Q. They all look the same to you?
A. They are very near about the same size.
Q. That is all.

(Witness excused.)

115 Mr. H. G. HOLBROOK, (White), being first duly sworn, was produced and testified as follows, to-wit:

Direct examination.

By Mr. Bozeman:

Q. Where do you live?
A. I live on the college car line, Meridian, Mississippi.
Q. And how long have you lived in Meridian?
A. Ever since '98.
Q. I believe that is about eighteen years?
A. Yes, sir.
Q. And you have been working for the New Orleans & Northeastern Railroad——
A. Sixteen years.
Q. In what capacity?
A. As tank inspector.
Q. At Meridian?
A. Yes, sir.
Q. Were you tank inspector at Meridian during the last year, 1915, still tank inspector?
A. Yes, sir, I have been continuously on the job.
Q. Now, what is your duty as tank inspector with reference to road engines?
A. Why, I have to look over all parts of the tank and then see that the work is done after every trip and before they go out.
Q. Now, this engine 260 that went out of Meridian south just before Mr. Scarlet was hurt, on the day before, did you inspect that engine before it went out?
A. Yes, sir, she laid in all day.

Q. Did you inspect the coupling apparatus between the tank and the engine?

A. The coupling part of it that connects on to the tank comes entirely under my jurisdiction.

Q. Well, does that include the king pin on the tank side?

A. That is a drawbar pin.

Q. Well, a drawbar pin?

A. Yes, sir.

Q. That is a pin that goes down through the drawbar, is it?

A. Yes, sir.

116 Q. Is that within your duty, to inspect that?

A. Yes, sir.

Q. Did you inspect that on the 260 before she left Meridian on that trip?

A. Yes, sir.

Q. What condition was it in?

A. As far as I could see it was in perfect condition.

Q. What condition was the drawbar in?

A. In good condition.

Q. And the safety chains between the engine and the tender?

A. They were in first-class condition.

Q. Now, Mr. Holbrook, explain to the jury here the size of that drawbar put between the engine and tender of the 260, about how wide and how thick.

A. It is about two and a half by four, and it is about—well, they have different lengths, but, on that engine, it is between four and five feet. It has two pins that goes one through each end. Now, the front pin I have nothing to do with that. That comes under the engine inspector. The back pin comes under me and, to put that pin in when working on the tank, we have to cut a piece out of the top of the woodwork and then fit a piece of half or three-eighths inch iron over that for the body of the pin and, of course, the head is perhaps,—well, the head of the pin is at least four inches and that is to make it fit right down to keep it from going through anything. Then we have a key-way in the bottom of the pins to keep them from working out and it is my business to see that that pin is in there and in condition and to see that this key is in the bottom of the pin to keep it from working out.

Q. Now, this bar, four inches is the width?

A. Yes, sir.

Q. And about two and a half inches thick?

A. Yes, sir, something like that, only it is heavier and larger, it is just in that kind of shape.

Q. And what is the diameter of this pin?

A. Two and a half.

Q. Two and a half inches?

117 A. Yes, sir.

Q. A round pin two and a half inches in diameter?

A. Yes, sir.

Q. And the head of that pin is what size?

A. About four inches.

Q. Four inches square?
A. No, sir, it is round.
Q. Four inches in diameter?
A. Yes, sir.
Q. And this piece of iron that you speak of, that is a plate that the head of the pin rests on?
A. That has nothing to do with the pulling. It just keeps the pin from going down.
Q. Now, what does this drawbar work on in there, on the tender or tank side, is it just loose from that, works up and down, or how?
A. If you were to go out there, Mr. Bozeman——
Q. I want you to tell the jury.
A. That is what I am talking about. I would tell you it was an alligator casting, but if you would go to the plue print you would find it was a drawbar casting. Now, the end still is fastened on to the tender frame with six rods that are an inch and a half. The bottom rods are 26 ft. 2, and there is three inches difference in the length. Now, that *that* holds that end sill on. That is an alligator casting. The sill, the front tank sill is ten by fourteen. That leaves four inches. That sill that drops below the frame of the tank and this alligator casting, as we call it, fits right up back of that end sill. There is four inch and a quarter bolts that comes through the alligator casting in the back that comes through the tank frame. The bottom of that sill is slotted out eight inches so as to give the coupling bar, this four by two and a half bar that goes in there, to give it play in case it goes around a curve, and this pin that goes down through that doesn't touch the bar, only for this thickness of the bar, which is about two and a half, not over two and a half or three inches, and that pulls right up against the back of the end sill.
Q. Now, what play up and down has that drawbar got in there?
118 A. It is due to have a half inch play.
Q. Now, how much of that pin is there played on by the drawbar?
A. Well, it is right at three inches.
Q. Three inches?
A. Yes, sir, it may be a quarter or half inch above that.
Q. That would be a half inch thicker than the bar itself?
A. Yes, sir, that is in case the tank hits a rough place or the engine hits a high joint to keep it from raising the tank or lowering the engine.
Q. Well, what kid of safety chains are those on that engine, how many links are there?
A. There are two classes of them, though the size of the links are the same.
Q. Well, what size links?
A. They are one and a quarter iron.
Q. What do you mean by one and a quarter iron?
A. It is fron about that size.
Q. One and a quarter inches in diameter?

A. Yes, sir, and welded into links and there is three or four of these links.

Q. And they extend from where to where?

A. They couple on to the front of the engine *is* what is called a deck casting by a pin about an inch and a half thick, and on the back it is fastened to the end sill of the tank just the same as the alligator casting, only there is one bolt that comes down back of the end sill, back of this piece of iron.

Q. Now, this engine 260, before this accident to Mr. Scarlet, had you had any trouble at all with the drawbar pin on the tank side of that engine?

A. Well, I have a record book for at least ten trips in front of it and it doesn't show that that casting was even tightened up and that would be my business, if there was one of these six and a quarter bolts loose it is my business to report it and see that it is done.

Q. Did you examine the safety chains before the engine went out?

A. We have to examine them every trip——

119 Mr. Fewell: We object.

Q. Well, did you examine them? I think you have said all right, but I am not sure, what condition were they in?

A. They were in good condition.

Cross-examination.

By Mr. Fewell:

Q. You say these safety chains consist of three or four lengths?

A. I couldn't tell you whether there was three or four.

Q. You can't tell whether there was three or four on this particular engine?

A. No, sir.

Q. Were there as many as two?

A. There were as many as three or four.

Q. What was the size of the link?

A. One and a quarter.

Q. I say the links?

A. The links are about five inches long.

Q. And they could not have been less than three or four inches?

A. No, sir.

Q. Well, they could not have been less than fifteen nor more than twenty inches in length?

A. I couldn't say what the length was.

Q. Well, if the links were five inches?

A. There was three or four links about five inches long.

Q. Now, you made an inspection of this engine how long before it went south?

A. I inspected it, why I couldn't say what time of day, but it was in the morning of the day before it went out.

Q. You inspected it the morning of the day before it went out?

A. Yes, sir.

Q. And what sort of inspection did you make of this link pin or king pin, whatever you call it?

A. It is my business to inspect every part of it.

Q. Well, did you inspect every part of it, did you take the pin out?

A. No, sir, you can't see the pin. Our inspection if that pin is standing perfectly vertical we recognize it as in first-class condition.

120 Q. Well, there is a good part of that pin that is hidden from you when you go and look at it?

A. Yes, sir.

Q. How much of it?

A. Practically all of it.

Q. How much of the pin goes down below there and is observable to your eye?

A. Right on five inches.

Q. And how long is the pin?

A. About twenty-six inches long.

Q. So, as a matter of fact, you only inspect five inches of that pin, is that right?

A. That is all you can see with your eye.

Q. Well, you say you didn't take the pin out?

A. No, sir.

Q. How long did you say these pins were twenty——

A. Right about twenty-six inches.

Q. So there is approximately twenty-one inches of that pin that you didn't see when you got there to inspect it, wasn't it?

A. Why practically all of the pin that has anything to do with the pulling is hidden from us.

Q. And on this occasion you didn't inspect the pin except that portion that you could see about five inches? I am talking about this particular engine on this particular occasion.

A. About five inches of the pin is all you could see.

Q. Now, the part of the pin that the weight was on was hidden from your eye, wasn't it?

A. It is hid from your eye, yes, sir.

Q. Then you didn't see or inspect the part of the pin that the strain was on on that occasion, did you?

A. No, sir, that is covered by this coupling bar.

Q. Now, Mr. Holbrook, the coupling bar is only three inches thick approximately?

A. It is about two and a half by four.

Q. Well, where is the balance of the pin?

A. Well, there is about eight inches of it that is in the
121 wooden frame. There is about three and a half inches of it that is in that coupling bar, in the casting in between the coupling bar, and then the alligator casting below that has about four or five inches of it that is hid and there is some little of it hid by that.

Q. So as a matter of fact you didn't see this pin except the top and bottom of it?

A. You could see the bottom of it——
Q. You didn't look at the top of the pin at all?
A. No, sir, not on this trip.
Q. How long was it before that that you looked at the top of——
A. I,——
Q. Don't you keep records of your inspections?
A. I told you that I keep these records.
Q. Where are those records?
A. I have one of them in my pocket.
Q. One of the records that you make for the company?
A. No, sir, I make no record for the company. I make records for myself. I am the foreman and inspector; I have to inspect the work and see that it is done.
Q. Then, don't you make some sort of report of your inspection?
A. No, sir, I go to my men to tell them to do it.
Q. That is all done just verbally?
A. Yes, sir.
Q. Why keep any memorandum at all?
A. Because I would want it.
Q. So you keep a record for your own use only?
A. When I find any defect on an engine I write it down in my book and when the men get it off one book I take my book and see what has or has not been done.
Q. What becomes of these books?
A. I keep them.
Q. You say you have not got but one record?
A. That is the only one I have with me, I have them all the way to 1910 in my desk at the shop.
Q. Do you mind my looking at the one which you have with you?
122 A. It belongs to the New Orleans & Northeastern.
Q. I thought you said it was your private record?
A. I said I kept it for myself.
Q. Then, what do you mean by telling the jury that it belongs to the Northeastern?
A. Because they pay for the—they pay for this book.
Q. Then you do keep a record for the Northeastern?
A. The Northeastern never sees this at all after they furnish me this book.
Q. But you say it belongs to the Northeastern?
A. Yes, sir.
Q. You don't mind my seeing it?
A. Not in the least.
Q. Well, turn to the inspection of this particular engine the last time you inspected it before Joe Scarlet was hurt—let me see it, please?
A. There is 253 the engine it was coupled to.
Q. I am talking about the 260.
A. And I told you if I find any defects I put them on the books; if I find no defects I don't put them on the book.
Q. You didn't find any defects?

A. No defects at all on the 260 that day.
W. What did it stay in the shops that day for?
A. To take that train out.
Q. How many engines *to* you inspect daily approximately?
A. About thirty-eight.
Q. You inspect thirty-eight engines daily?
A. Yes, sir.
Q. And you recall definitely the inspection of the 260 just before Joe Scarlet was hurt?
A. It is my business to inspect every engine that comes in.
Q. That is not answering my question.

Mr. Bozeman: That is his reason.

(The stenographer read the question.)

A. I am paid from six until six by the Northeastern Railroad Co.

Mr. Fewell: I move to exclude the answer as not being responsive.

123 Mr. Bozeman: Let him give his reasons.
The Court: Just answer the questions.
The Witness: I think I have a right to answer it in my own way.
The Court: Go ahead and answer.

Q. I will withdraw the question if he don't want to answer it.
A. I don't object to answering the question, but I couldn't answer it without explaining it to you.
Q. Now, your record that you produced here doesn't show anything the matter with the 260?
A. Not on that date.
Q. Well, does it show anything at a prior date?
A. Yes, sir.
Q. Find the first memorandum you have made there, please, sir, to the date in question of anything wrong with the engine.
A. On the seventh.
Q. Of what month, please, sir?
A. On the ninth and seventh, 1916. She was reported for screens on the cab windows.
Q. Well, this accident occurred in 1915.
A. 1915.
Q. And yet you have a record made of inspection for 9/7/16?
A. I was mistaken, it was 1915, for screening cabs.
Q. Screening the cabs?
A. Yes, sir, all engines in double header service are required to have screens on the little window that fits over the front cab door.
Q. Are they required to have anything else to strengthen them for hauling double headers?
A. That cab window wouldn't have anything to do with them.
Q. Are they required to have anything else on the engines to strengthen them?
A. Yes, sir.
Q. What else?

A. We have a drawbar that comes over the front of the coupler where two engines are coupled together. There is a strip of five-quarter by four iron, one on each side of the drawbar, that
124 goes over and catches the two inch pin.

Q. There is one on the rear end too, isn't there?

A. The drawbar or coupler on the back of the tank is a different proposition.

Q. Explain what that proposition is?

A. Well, the one on the front swings back like a hinge. When you are running for instance the head engine as the coupler hits a key or anything and when they couple it together they have what we call a safety pin. That goes through the back of these openings and on through the end of the coupler and there is a two and a quarter inch bolt that holds that coupler on. This piece is possibly about as wide as that. That comes over the front sill and two bolts catch it and then comes down and catches this two and a quarter inch bolt.

Q. Now, that is put there for the purpose of strengthening the double header?

A. Yes, sir.

Q. Now, they have got something on the back end of the tender?

A. No, sir.

Q. They had a drawbar——

A. No, sir, it is a coupler.

Q. Automatic coupler?

A. Yes, sir.

Q. What if anything has been done by the railroad in the way of strengthening the coupling between the engine and tank for double header service?

A. Well, I don't know as it was done to strengthen but to save the castings. Our new master mechanic has stopped ordering any more of these alligator castings. They are going to use a new type. These Class D engines they have these big alligator castings and when one of these now goes in the shop to be overhauled they have the hole reamed out. Some of them we have to put a bushing in them to make them fit the pin.

Q. And that is the only difference in the pin as between the engine and tender and to the equipment prior to Mr. Scarlet being hurt in the double header service?

A. That is the only thing I know anything about.

125 Q. Now, the equipment is exactly the same with the exception that you have just mentioned between the engine and tender?

A. Yes, sir, all these class D engines.

Q. What class engine is this 260.

A. Class D.

Q. When the men that you notify to make reports report them, don't the company require some sort of record of the work on the engine?

A. That is the thing I wanted to explain to you just now that I am different from any man working for the Northeastern. I keep my own records.

Q. Well, how does the company know what to pay out for supplies?
A. We draw a requisition. I issue a requisition.
Q. Now, you issue a requisition for all supplies to an engine?
A. No, sir, for what my men use.
Q. Now, when you find anything like that wrong you make a requisition on the storekeeper for that?
A. Yes, sir.
Q. And he furnishes it?
A. Yes, sir.
Q. Do you keep a copy of these requisitions?
A. I do now.
Q. Well, did you at the time of Joe Scarlet's injury?
A. Yes, sir, we have for the last three years.
Q. Where is the record that you keep?
A. Why, it is a different kind of book from that.
Q. Where is that?
A. They are at the Northeastern shops.
Q. Why didn't you bring it here with you?
A. I never thought about needing it.
Q. Well, you say they are kept for three years approximately?
A. Do you want to know why they are kept?
Q. No, I just asked you why you didn't bring your record down here with you?
A. They don't have anything to do with anything pertaining to my work at all.
Q. They do have something to do with the stuff furnished
126 to supply defects that your men discover?
A. In the case of a king pin they wouldn't.
Q. Well, where would you get a new one?
A. Give an order on a piece of paper about the size of it to the blacksmith.
Q. And he would make it and would not get any receipt from you?
A. He draws requisition from the storeroom and charges a certain amount on the order.
Q. He makes it himself, the pin?
A. Yes, sir.
Q. You don't mind my keeping this, do you?
A. I don't mind you keeping it, but it is the company's.

Redirect examination.

By Mr. Bozeman:

Q. Mr. Holbrook, Mr. Fewell asked you whether you took this pin out and inspected it. There are a great many parts to a tank and engine in the way of bolts and rods and other things like that within the tank that are not visible to the eye?

Mr. Fewell: We object to leading the witness.

Objection sustained.

Q. Is that true or not as to whether or not that is true?

A. Why, about nine-tenths of the tanks you never see any more until you tear them up.

Q. Well, have you had to take every bolt and rod out every time you inspected it to see whether it was bent or twisted in any way? Where it is hidden you would have to tear the engine to pieces every time you inspected?

Mr. Fewell: We object to leading?
The Court: Objection sustained.

Q. What would be the effect of that, how long would it take?

(Question withdrawn.)

Q. How long would it take you if you had to take out all the bolts and things you can't see and look at them,—how long does it take to inspect a tank?

A. Why, you would not run an engine a month.

Q. You mean by that that it would take a month to do it?

A. I meant just what I said. You would not run an engine a month. You take these engines the way we are using them
127 now and it would take close on to a month to tear one of them up.

Q. State whether or not from your experience yourself as an inspector of tanks and engines, including the inspection of this coupling apparatus between the engine and tank, if the inspection you say you did give to thi pin is an inspection that would reasonably show any defect or trouble about the pin?

Mr. Fewell: We object to that. That is a question for the jury to say.
The Court: Objection overruled.

To which action and ruling on the part of the Court, the Plaintiff, through counsel, then and there excepted.

A. The inspection that I would make—I will have to answer your question just like I would——

A. Answer in your own way.

A. The inspection I would make is the only one that is really practical for a man to make.

Mr. Fewell: We move to exclude that as not responsive to the question and as calling for an opinion of the witness.

Objection overruled.
To which action and ruling on the part of the Court, the Plaintiff, through counsel, then and there excepted.

Q. That is all.

(Witness excused.)

Mr. J. J. SMITH, (White) being first duly sworn, was produced and testified as follows, to wit:

Direct examination.

By Mr. Bozeman:

Q. Where do you live?
A. Meridian.
Q. How long have you lived there?
A. Eleven years.
Q. You work for the New Orleans & Northeastern Railroad?
A. Yes, sir.
Q. During all that time?
A. Yes, sir.
Q. In what way?
128 A. First year I was night foreman and last ten years engine inspector.
Q. What is your duty and what was your duty in September 1915 in the matter of inspecting road engines for the New Orleans & Northeastern?
A. I was inspecting engines at that time.
Q. I mean what did you have to do with reference to the inspection?
A. Well, look the engines over entirely, all the machinery, tank, etc.
Q. State whether or not you inspected this engine 260 that went out of Meridian to Picayune in a double header on the day before Mr. Scarlet was hurt?
A. I inspected that engine on the eleventh?
A. Eleventh of September?
A. Yes, sir.
Q. Where was it when you inspected it?
A. In the yard near the round house.
Q. At Meridian?
A. Yes, sir.
Q. Did you inspect the coupling apparatus between the engine and the tender?
A. Yes, sir.
Q. In that connection, did you inspect the king pin or the drawbar pin on the tank side of the apparatus, coupling apparatus?
A. Yes, sir.
Q. What condition was it in?
A. Good as far as I could see.
Q. Did you inspect the safety chains between the engine and tank?
A. Yes, sir.
Q. What condition were they in?
A. Well, they looked to be good.
Q. Did you see anything wrong or out of order about any of that apparatus?
A. No, sir.
Q. That was on the eleventh of September?
A. Yes sir on the eleventh.

129 Cross-examination.

By Mr. Fewell:

Q. You say it looked to be good as far as you could see?
A. Yes, sir.
Q. How long are those pins?
A. They are all that length.
Q. How many inches long?
A. Well, about fifteen or sixteen inches.
Q. How much of it could you see?
A. Well, you could see that much of the lower end and the top end you couldn't see.
Q. How much of that of the lower end you couldn't see?
A. Of this pin?
Q. Yes, sir.
A. Well, you can see about that distance, seven or eight inches, six or seven inches.
Q. Six or seven inches.
A. Yes, sir.
Q. And it is how long you say, the pin itself?
A. Well, about sixteen inches these pins are,—looked to me like, I never measured them.
Q. Isn't it a fact that the pin is twenty-six inches long?
A. I never measured them.
Q. If, as a matter of fact, it is twenty-six inches long you just see about five or six inches of it?
A. Yes, sir.
Q. And this part you see was the part that was below the strain?
A. Yes, sir.
Q. You didn't see the part on which this strain of the loads come?
A. No, sir.
Q. How much of the top did you see?
A. Couldn't see the top, that comes down flush with the body of the tank.
Q. Mr. Smith, is it a fact that the New Orleans & Northeastern Railroad Co. just equip their engines with a king pin of the character that was on the 260 between the engine and tender and just leave it there without ever inspecting the pin itself?

130 A. Yes, sir, they are inspected occasionally, according to the wear. They don't hardly run them more than six or seven weeks; the slack comes in there and we have to take these pins out.
Q. Did you make those inspections?
A. Yes, sir.
Q. How would you go about that?
A. You mean the wear on the pin?
Q. Inspecting the whole pin?
A. Well, you would have to take it out to do that.
Q. Well, how often would you do that?
A. Well, every three months is as much as the Northeastern requires. We take it out oftender than that.

Q. The government of the United States requires you to inspect those pins, doesn't it?

A. Yes, sir.

Q. And it is a compliance with the government rule that you just inspect that part of the pin?

A. Well, a pin that don't show any wear we don't take them out. If they get too much worn we take them out.

Q. You never take the pin out unless there is something that indicates that there is too much wear?

A. No, sir, we don't take them out. If they don t show wear there is no trouble.

Q. Well, man, how can you tell where they are worn if you don't see.

A. We tell by this wear, when the slack comes apart.

Q. You mean the slack between the engine and tender?

A. Yes, sir.

Q. So you never inspect these pins at all unless there is some slack between the engine and tender?

A. That often comes, every six weeks, we have to take them out and take up slack in there and then these pins are examined.

Q. When you last—before this engine left Meridian on Sept. 11th, did you take that pin out?

A. I don't remember that.

Q. Haven't you got some records of that?

A. No, sir.

131 Q. Did you do it within the last year?

A. I suppose I did. The engine was overhauled since that.

Q. When was it overhauled?

A. I don't know.

Q. You say you have to take those pins out every five or six weeks?

A. Yes, if they show any wear we take them out.

Q. And it is necessary to take these pins out every five or six weeks?

A. It may go a little longer.

Q. Did you take these pins out every five or six weeks before this injury?

A. I don't remember that.

Q. So you just went ahead assuming that the pin was all right by the wear?

A. That is what we have got to go by is the wear.

Q. You said something awhile ago about the government requiring you to do something. You mean that this pin and safety chain is known under what is called safety appliance——

Mr. Bozeman: We object to that and also to what the witness testified about what the government requires and move to exclude it. The order of the government is a written order and is the best evidence.

Objection and motion overruled.

To which action and ruling of the Court the Defendant, through counsel, then and there excepted.

Q. Did you make an inspection of this engine under the order of the United States government?
A. No, sir, I inspected these engines before that come in.
Q. Before that come in?
A. The government requiring——
Q. What do you mean by the government coming in?
A. From the first of January.
Q. You mean that the amendatory act of the boiler inspection didn't take effect until January, is that right? In other words, the government didn't furnish you any blanks to make these reports on until then?
A. Yes, sir.
132 Q. Well, you inspected these engines before the government furnished you those blanks?
A. Yes, sir.
Q. Was your inspection then just as careful as it is now?
A. Yes, sir, the very best I possibly could.
Q. And yet you tell the jury that you never went and looked at this pin unless there was some trouble between the engine and tender?
A. Yes, sir, I would report if there was some slack there and they would take them out.
Q. You don't know how long it was before this accident that such condition had existed in this pin?
A. No, sir, it looked perfectly close together. That is all I have to go by.
Q. Now, what sort of chains were these?
A. Safety chains just like on all other engines.
Q. Well, what sort were they?
A. Inch and a quarter.
Q. How many links?
A. I didn't measure them. There is about three inches clearance left in these chains.
Q. About three inches slack left in these chains?
A. Yes, sir.
Q. And how many lengths in there?
A. I didn't say how many.
Q. I am asking you now?
A. I couldn't tell.
Q. Well, was there more than two?
A. Oh, yes, sir. There is five or six links in the chain.
Q. Well, let's don't guess about it?
A. There was more than two and more than three, I am satisfied.
Q. Well, what was the condition of those chains?
A. Looked to be good.
Q. Didn't you see a welded place in one of them?
A. No, sir.
Q. That was on the 11th and this accident occurred on the 14th?
A. Yes, sir, of September.
133 Q. Did you look to see whether there was any welded place in the chain?

A. No, sir, I noticed the chain and the links seemed to be altogether.

Q. That was the extent of your inspection, just to look at them and see that they were hanging together?

A. Yes, sir.

Q. How many chains do they have on there?

A. Two, one on each side.

Q. What were those chains for?

A. In case a pin would break or drawbar it would catch it before they would separate entirely.

Q. And if the chains were sound it would do that?

A. It looked like it ought to, but sometimes it didn't—whenever it breaks and there is a jerk like that it is liable to break it.

Q. How often have you heard of such a thing as an engine tank pulling apart?

A. In my experience a good many times.

Q. Northeastern engine?

A. I don't know that I have heard of but one outside of this.

Q. Did that occur before or after the accident?

A. That was before this, that is all I know.

Q. After that first one occurred did the railroad company undertake to strengthen the engine between the engine and tender in any way?

A. I don't know what they did.

Q. Wasn't it practically the same equipment right along?

A. Yes, sir.

Redirect examination.

By Mr. Bozeman:

Q. What is this slack that you spoke of when you noticed the slack?

A. It is the wear on the pin and sometimes caused what we called lost motion when you go to start out and that was taken up in some way.

Q. Now, if there was any wear on the pin it would show in the slack between the engine and tender?

A. Yes, sir.

134 Q. In this inspection of September 11th, was there any such wear or slack?

A. No, sir, everything came up perfectly close together.

(Witness excused.)

Mr. M. HUGHES (White), being first duly sworn, was produced and testified as follows, to-wit:

Direct examination.

By Mr. Bozeman:

Q. Mr. Hughes, you live at Picayune, do you?

A. Yes, sir.

Q. How long have you lived there?
A. Five years.
Q. You work for the New Orleans & Northeastern Railroad Co.?
A. Yes, sir.
Q. In what way?
A. Machinist.
Q. Do you have anything to do with now, and did you in September, 1915, with the inspection of road engines?
A. Yes, sir, I worked on the engines.
Q. You worked on the engines?
A. Yes, sir.
Q. Did you inspect this engine 260 at Picayune on the day that it went out from Picayune north in a double header when Scarlet was hurt?
A. Yes, sir, I did.
Q. Did you inspect the coupling apparatus between the engine and tank?
A. Yes, sir.
Q. Did you inspect the king pin or draw bar pin on t*e*h tank side?
A. Yes, sir.
Q. What condition was that coupling apparatus in and in what condition was that pin?
A. As far as I could see it was in good condition.
Q. Did you inspect it, did you give it a sufficient and careful inspection to see what condition it was in?
A. Yes, sir.
135 Q. Did you make any inspection of the safety chains between the engine and tank?
A. Well, they looked all right.
Q. Did your inspection show any trouble or defect of any kind? If so, what was it?
A. None at all.

Cross-examination.

By Mr. Fewell:

Q. You say as far as you could see the pins looked all right?
A. Yes, sir.
Q. As far as you could see the chains looked all right?
A. Yes, sir.
Q. How far could you see of the chain?
A. You can see all of the chain.
Q. Could you see how the chains were fastened to the locomotive and tender?
A. Yes, sir.
Q. How long did you spend at the time inspecting this particular engine?
A. I don't know exactly how long, I suppose——
Q. Well, approximately how long?
A. Some twenty-five minutes.

Q. It took you twenty-five minutes to look over the entire engine?
A. No, sir.
Q. How long did it take you to inspect the coupling between the engine and tender?
A. Well, a couple of minutes.
Q. So you found out everything was safe in a couple of minutes?
A. Yes, sir.
Q. How much of this pin could you see?
A. Just below the castings.
Q. That is how much?
A. About four inches.
Q. Was there any pin in the bottom of that?
A. Yes, sir.
Q. Now, you could see about four inches?
A. Yes, sir.
136 Q. How long are one of these pins?
A. About eighteen or twenty inches long.
Q. Aren't they twenty-six inches?
A. I work on them every day.
Q. You mean you take them out every day?
A. No, sir, I don't take them out every day?
Q. If it was necessary to take them out you would do it?
A. Yes, sir.
Q. Now, on this occasion you saw about three or four inches?
A. Yes, sir.
Q. And that was the part on which there was no strain at all?
A. No, sir, no strain on that part below there.
Q. Now, the strain was up and in a hidden place. You couldn't see that at all?
A. No, sir.
Q. You didn't take that pin out on that occasion?
A. No, sir.
Q. You don't know what condition that pin was in between the top and bottom except that the pin was not bent and had not fallout?
A. If it is bent it shows and if it breaks it falls out.
Q. And something else falls out when they do fall out?
A. Sometimes.
Q. Now, that is the only way you had of determining whether or not that pin was all right?
A. Without taking it out, yes, sir.
Q. Well, you could have taken it out?
A. Oh, yes, sir.
Q. Are you the only inspector that they have down there?
A. Only machinist, yes, sir.
Q. How long would it have taken you to have taken that pin out and inspected it?
A. Four or five minutes.
Q. You could have done that in four or five minutes?
A. Yes, sir.

Q. How long had it been prior to that time that you had taken this pin out and examined it?

—. ——.

137 Q. Well, unless you find that the bottom is bent you don't take them out?

A. No, sir, or some defect. There may be a defect in the casting or sometiing else and then I have to take the pin out.

Q. How about the castings in this engine?

A. They were all right.

Q. How about the fastenings of these chains?

A. Yes, sir.

Q. And you examined them all in two or three minutes?

A. Yes, sir.

Q. Did you get down under there?

A. Yes, sir, in the pit.

Q. Put the engine over the pit?

A. Yes, sir.

Q. Then you went down under there?

A. Yes, sir.

Q. What time of day was it that you inspected?

A. I don't remember the time of day.

Q. Well, was it night or day?

A. At night, I don't know what time.

Q. Have you any personal recollection of inspecting this particular engine on that occasion?

A. Yes sir.

Q. Outside of some record that you keep?

A. Yes, sir.

Q. What refreshes your recollection about it?

A. When I heard that it pulled out that called to my mind what the engine was and all about it.

Q. And that is what refreshes your recollection about it?

A. That is what refreshes my recollection that I had inspected the engine.

Q. You don't recall whether that inspection was made in the night or in the day time?

A. It was at night.

Q. What sort of light did you have in that pit?

A. Had a good torch light.

138 Q. And what about the link pins?

A. That is all any of us have is good torch lights.

Q. You mean a torch that has not got any globe around it?

A. A big kerosene torch.

Q. Is that what you call an engineer's torch?

A. Yes, sir.

Q. And that inspection was made in the night time?

A. Yes, sir.

Q. And you had a smoky kerosene oil torch?

A. There was no smoke there.

Q. Don't you know you can't make a torch out of any kind of kerosene that don't smoke?

A. It didn't bother me.
Q. It didn't bother you on this occasion?
A. It don't bother no time.
Q. What time of night was it that you made the inspection?
A. I don't recall exactly the time of night.
Q. Was it the first half or last?
A. First part.
Q. Anybody there?
A. No, sir.
Q. How long had the engine been in?
A. I don't know it come in sometime during the day.
Q. And was going out that night?
A. Yes, sir.
Q. That is all.

Redirect examination.

By Mr. Bozeman:

Q. The torch you used, is that the kind of torch that is used generally for making inspections of that kind?
A. Yes, sir.
Q. Now, with reference to the time it would taken you to take this pin out and look at it, suppose you had to take out all the pins and bolts how long would it take you to inspect an engine?
A. It would take you two or three hours.
Q. Why didn't you take it out?
A. It was not necessary. We don't take them out unless we find something the matter. I am the only man there and I have
139 all this work to do.
Q. From your experience as a machinist and as an engine inspector, state whether or not the inspection you did give this pin on that occasion was reasonably sufficient to show whether there was any defect in it or not?
A. Yes, sir.

Mr. Fewell: We object to that and move to exclude the answer.

Which objection and motion was overruled by the court. Plaintiff then and there excepted.

Q. That is all.

Dr. W. W. Reynolds, (White) being first duly sworn, was produced and testified as follows, to-wit:

Direct examination.

By Mr. Bozeman:

Q. Dr. Reynolds, you live in Meridian?
A. Yes, sir.
Q. How long have you lived there?
A. About eighteen years.

Q. Are you the surgeon there for the New Orleans & Northeastern Railroad?
A. Yes, sir.
Q. Were you in September, 1915, when Mr. Scarlet was hurt?
A. Yes, sir.
Q. Doctor, are you a graduate of any medical college?
A. Yes, sir.
Q. What college?
A. Louisville Medical, Louisville, Ky., 1898.
Q. Are you licensed to practice under the laws of this state?
A. Yes, sir.
Q. How long have you practised medicine and surgery?
A. I came to Meridian in 1898 and have practised ever since, 18 years.
Q. Did you see Mr. Scarlet after he was injured?
A. Yes, sir.
Q. Do you remember the date that you saw him?
A. Twentieth of September.
140 Q. Where did you see him?
A. At his rooming house or rooming place.
Q. Where he boarded?
A. Yes, sir.
Q. Well, did you find him in bed?
A. Yes, sir.
Q. Did you make an examination of him?
A. Yes, sir.
Q. Did you strip him?
A. Yes, sir.

Mr. Fewell: We ask that the jury retire. We want to interpose an objection.

The jury was sent out of the room, whereupon the following proceedings were had and entered of record, to-wit:

Mr. Fewell: The Plaintiff objects to Dr. Reynolds testifying in this case about his condition, about any condition he found him in, and about any statement he made, if made, or any statement that the doctor makes touching the physical condition of the plaintiff, under section 3695, I think it is, of the Code.

The Court: Is that the purpose of introducing this testimony?

Mr. Bozeman: That is one purpose. In response to this objection, the Defendant says that the Plaintiff, by introducing other physicians and surgeons and proving his condition by them, and their treatment of him, waived this statute and that the Defendant is entitled to introduce any and all medical testimony with reference to his condition at the time.

The Court: I don't so understand the law, Mr. Bozeman. This is a privileged communication that nobody but the plaintiff himself can waive. Objection sustained.

To which action and ruling of the Court, the Defendant, through counsel, then and there excepted.

Mr. Cameron: I submit that this testimony is incompetent and that the jury has no right to hear any of it at all. I submit if he wants to make his record he can make it in the absence of the jury.

Mr. Bozeman: I don't want the witness to testify. I just
141 want the court——

Mr. Fewell: We don't have to make our objections in the presence of the jury.

The Court: I don't think so either. You can get it all in the record while the jury is out.

The jury was brought back in the room, whereupon the following proceedings were had and entered of record, to-wit:

Mr. Bozeman: I want to ask him another question along that line. State to the jury——

Mr. Cameron: We submit that he has now indicated to your honor that he wants to ask another question along that line.

Mr. Bozeman: I think I am entitled to ask this question in the presence of the jury.

The Court; Do you want to argue the proposition?

Mr. Bozeman: I want to ask the question.

The Court: If it *it* is along the same line I don't think it should be asked in the presence of the jury.

Mr. Bozeman: I think I have a right to ask these questions in the presence of the jury and let any objections that counsel have to make be made in the presence of the jury.

Mr. Fewell: We can just consider that the questions were asked in the presence of the jury and objected to by the Plaintiff and sustained by the Court.

The Court: Let the jury retire.

The jury was again sent out of the room, whereupon the following proceedings were had and entered of record, to-wit:

Mr. Bozeman: Take this, Mr. Stenographer: Counsel for the Defendant asks the Court for leave and insists upon their right to ask this witness, Dr. Reynolds, in the presence of the jury, to state what he found to be the condition of Mr. Scarlet, from his examination and treatment of him, as a physician, and that if the Plaintiff desires to object to that for any reason that the objection should also be made in the presence of the jury, and that the ruling of the court upon the objection should be made in the presence of the jury. And, in this connection, counsel for the Defendant states that they do not
142 desire to argue the question in any way in the presence of the jury, but simply ask the questions in order that the jury may be advised as to why the Defendant does not examine the witness, Dr. Reynolds, with reference to the condition of the Plaintiff, Scarlet, at the time that Scarlet was treated by him according to Scarlet's own testimony.

Which leave was refused by the court; to which action on the part of the Court the defendant, through counsel, then and there excepted.

Mr. Bozeman: The jury still being out, counsel for the Defendant moved the Court to advise the jury when they returned that the Defendant offered to prove by the witness Dr. Reynolds, the condition of Scarlet with reference to his injury when treated by Dr. Reynolds and that this testimony was objected to by the Plaintiff for the reason that it was a privileged communication and sustained by the court, and that, for this reason the Defendant does not offer the testimony.

Said motion was overruled by the Court; to which action and ruling of the Court the Defendant, through counsel, then and there excepted.

The jury was brought back in the room, whereupon the following proceedings were had and entered of record, to-wit:

Mr. Bozeman: Doctor, have you had any practise or experience during your college course or after in the matter of dissecting the human body?

A. Yes, sir.

Q. Have you had any experience in reading X-ray pictures?

A. Yes, sir; for the bone part, solid substance, not tissue.

Q. Have you an X-ray machine yourself?

A. Yes, sir.

Q. Do you yourself operate it and take pictures with it?

A. Yes, sir.

Q. I will ask you to lo-k at this X-ray picture of a part of the spinal column of the Plaintiff, Scarlet, and state whether or not it shows any curvature of the spine or any displacement of any of the lumbar vertebræ?

Mr. Fewell: We object because it is leading. Let him state what it does show.

Q. And, if so, please state what it is?

143 Mr. Fewell: I will withdraw the objection.

A. It is kind of hard to see unless I get to a light.

Q. Well, go to the window and look at it, Doctor.

A. I note that the spinal column is not straight with the plate, but I do not observe any curvature.

Q. What do you mean by its not being straight with the plate?

A. Well, it runs a little to one side or the other. But the line of the vertebræ, I don't see or notice any curvature.

Q. You heard the testimony of Dr. Shipp in this case, did you?

A. Yes, sir.

Q. And you saw him point out the little projections on the back of the spinel column, what is it you call that?

A. You will notice that he pointed out a dark area and that the spine was deflected to one side.

Q. Does this picture show any such thing as that?

A. No, sir, the picture shows the bones in line, the bones of the body are in perfect line.

Q. In this picture here I notice running along in the middle of

this spine here some whiter lights, little long white lights right along in the middle. What are those little long white substances?

A. Those are the spines, the spines in the middle of the back.

Q. You heard Dr. Shipp testify about putting his finger on three of these projections. Are these little white lines in there pictures of those projections, of these projections in the back?

A. Yes, sir, and these spines are on the back side of this picture.

Q. You can see where they are in there, can you?

A. Yes, sir.

Q. State whether or not they are in alignment or not?

A. They are in perfect line as far as I am able to see. In this first and second, there is the point of the second—it is right in the middle of the body. It is on the other side, on the back. Now, these dark areas they show there because that is only the middle of the body. It is clearer in the middle of the plate than it is towards the border. That is because the rays are not as
144 intense up there as they are immediately under the tube and towards the middle of the plate.

Q. You heard the testimony of Dr. Rush in this case, did you?

A. Yes, sir.

Q. You heard his testimony with reference to the nerves from the second lumbar vertebræ?

A. My recollection was it was the first lumbar vertebræ.

Q. Between the first and second, was it?

A. Yes, sir, that would be the position of the first lumbar vertebræ at the bottom side of the lumbar vertebræ where the first vertebræ nerve would come out.

Q. Now, Dr. Shipp testified, as you heard that, in his opinion, there was a slight dislocation which caused the pinching of the nerve between the first and second lumbar vertebræ. Just explain to the jury what part of the part is reached and affected by the nerve that comes out between the first and second lumbar vertebræ.

A. That would be the first lumbar. It is a comparatively small nerve as regards the nerve above it, the twelfth dorsal. It is a nerve that is concerned principally in the supplying of the skin over a small area on the outside of the hip bone and of the skin low down in the abdomen and a small patch of skin in the groin and the spine up to the root of the private and some muscles, helps the one above it, the twelfth dorsal, supply the muscles in the abdomen on either side lower down, it helps to supply them.

Q. State whether or not that is a nerve that has any connection whatever with the kidney or liver?

A. None.

Q. Or whether it in any way affects the kidney or liver?

A. No, sir.

Q. Or has anything to do with either functions?

A. No, sir.

Q. State whether or not a pinching of that nerve would enlarge a man's liver?

A. No, sir.

Q. Or would have any effect on his urine at all?

145 A. No, sir.

Q. Doctor, if a nerve like that were pinched where it comes out of the back bone, state whether or not it would be—state whether or not the injury to that nerve would be manifested throughout the entire length of the nerve or in merely the surface or place where the person was——

A. All the whole length of the nerve.

Q. Well, if this nerve that comes out from between the first and second lumbar vertebrae were pinched at that point, where would Scarlet feel or suffer?

A. He would feel it all along the distribution of the nerve from the point where it was impinged to the final termination of the nerve itself.

Q. State whether or not that nerve would give any trouble in the small of the back that would interfere with a man's use of——

A. No more than it would in the other parts of the body where that nerve supplies. You would have a sensation where that nerve supplied.

Q. If that nerve were the trouble there, state whether or not Scarlet would just have the pain in one place here in his back just above his waist?

A. Well, if it was pain or absence of pain if it went to the point of distributing the nerve, he would have no sensation where that supplied the skin. It would be a dead nerve if it was pinched to that extent. If it was pinched to a small extent you would possibly have a disturbed sensation at the points supplied by that nerve.

Q. You heard the testimony of Dr. Smith in this case?

A. Yes, sir.

Q. Who testified about the symptoms he found in Scarlet?

A. Yes, sir.

Q. And the examination he made?

A. Yes, sir.

Q. You heard Scarlet's testimony as to his symptoms?

A. Yes, sir.

Q. And you heard the testimony of Dr. Rush?

A. Yes, sir.

146 Q. About the X-ray picture?

A. Yes, sir.

Q. And all Dr. Shipp said about it?

A. Yes, sir.

Q. State from all of this testimony, Scarlet's own testimony, and the testimony of these other doctors about what they found to be the matter with Scarlet, whether or not Scarlet has got any injury that should be permanent at all?

A. I see none whatever.

Q. Doctor, you have observed Scarlet in the court room here today, haven't you.

A. Yes, sir.

Q. Of course, you are not here today to treat him?

A. No, sir.

Q. He has not been under your treatment in a long time?

A. No, sir.
Q. Did you see him strip himself in the court room?
A. Yes, sir.
Q. And you have seen how he handled himself on the witness stand and walked around and about?
A. Yes, sir.
Q. Just state from his testimony and your observation of Scarlet whether or not you see anything serious or permanently the matter with him?
A. I see nothing serious or permanent.
Q. Take the witness.

Mr. Fewell: Stand aside.

(Witness excused.)

The defendant here rested *his* case and the plaintiff also rested. These were all the proceedings had.
This was all the record entered by the stenographer.

147 I, F. A. Donnelly, Jr., Official Court Stenographer, Pro Tem. for the Tenth Judicial District of the State of Missippi, do hereby certify that the foregoing pages contain a true and correct transcript of my stenographic notes taken on the trial of the above-styled cause.
I further certify that I have this day notified Messrs. Fewell & Cameron and Bozeman & Cameron, all of Meridian, Mississippi, that the foregoing transcript of my stenographic notes have been forwarded to the Clerk of the Circuit Court of Clarke County, Mississippi. That said notice was given to said attorneys by and through the United States mail with proper postage prepaid addressed to said attorneys at their usual place of residence, which is as above stated.

Witness my hand this the 29th day of April, A. D. 1916.
F. A. DONNELLY, JR.,
Official Court Stenographer Pro Tem.

This is to certify that the stenographer's notice to us of the filing of the foregoing notes was mailed on May 1st, 1916, and having examined the said notes, we have this day delivered the same to Fewell & Cameron, Attorneys for Appellee, Joe Scarlet, for the purpose of examination and suggesting corrections therein.
We do not suggest any corrections in the notes.
Witness our signature- this 16th day of May, 1916.
A. S. BOZEMAN,
BEN F. CAMERON, JR.,
Attorneys for Appellant Railroad Co.
FEWELL & CAMERON,
Attorneys for Plaintiff.

148 No. 1.

The Court instructs the jury for the Plaintiff in this case that what is known as the Prima Facie Statute of Mississippi is a rule of evidence and is admissible and binding even though the plaintiff's right of action is circumscribed and controlled by the act of Congress known as the Employers' Liability Act and that proof of injury from the running of defendant's engine and cars is prima facie evidence of negligence on the part of the defendant and in order to meet same the defendant must show facts and circumstances surrounding the occurrence and thus show to the jury that there was no negligence on its part and that this presumption is not met by conjecture and surmise.

"Given."

No. 2.

The court instructs the jury for the plaintiff in this case that if you believe from the evidence that the defendant was negligent and that the defendant's negligence was the proximate cause of plaintiff's injury then your verdict should be for the plaintiff.

"Given."

No. 3.

The court charges the jury for the plaintiff that it was the bounden duty of the defendant railroad company to furnish plaintiff safe and suitable appliances and machinery and to exercise proper care to see that said appliances were maintained in such condition and if the plaintiff was injured by reason of and as the proximate result of defendant's failure in such regards your verdict must be for the plaintiff.

"Given."

No. 4.

The Court charges the jury for the plaintiff that the safety appliances acts including the Boilers inspection act and the supplemental Boiler inspection act enacted by Congress imposes upon the
149 defendant an absolute duty to keep its engines, tenders and appliances thereon in a safe condition and that this duty is absolute and is not complied with simply by proving that a reasonable inspection was made of the draw bar king pin and chains in this case if you believe from a preponderance of the evidence that the plaintiff was injured by the tender and engine pulling loose caused by defective coupling appliances and plaintiff was thrown or fell to the ground then the defendant is liable and you should so find.

"Given."

No. 5.

The Court charges the jury for the plaintiff that if you believe from a preponderance of the evidence that the king pin or chain in question were defective and that this defective condition proximately caused the injuries to plaintiff then the doctrine of assumption of risk does not apply and is no defense to this suit.

"Given."

No. 6.

The Court charges the jury for the plaintiff that there is no evidence of contributory negligence in this case.

"Given."

No. 7.

The Court charges the jury for the plaintiff that the drawbar King Pin and chains between engine and tender were subject to the provisions and requirements of the safety appliance acts and amendments thereof including the supplemental Boiler Inspection Act and in this case if you believe from a preponderance of the evidence that the said King Pin or chains were in a defective condition and that by reason of their defective condition the plaintiff was injured then the plaintiff is entitled to recover regardless of the doctrine of assumption of risk.

"Given."

No. 8.

The Court charges the jury for the plaintiff in this case that if their verdict be for the plaintiff that it is not necessary for plaintiff to prove his damages in dollars and cents but the jury should award him such damages as will fully compensate him for his
150 physical and mental suffering, his loss of time, and in the event the jury believes from the evidence that plaintiff — permanently injured then in addition to the above damages permanent damages should be awarded.

"Given."

No. 9.

If the jury should find for the plaintiff the verdict should be, "We the jury find for the plaintiff and assess his damages at $—" And the amount of same is within the discretion of the jury under the evidence and they may find in such sum in their discretion up to the amount of Twenty-five Thousand Dollars.

"Given."

No. 10.

The Court charges the jury for the plaintiff in this case that if you believe from the evidence that plaintiff's injury was the result of the

breaking of the safety devices between the engine and tender then the law is with the plaintiff and you must find a verdict in his favor in such sum as will fully compensate him.

"Refused."

No. 11.

The Court charges the jury to find for the plaintiff and assess his damages.

"Refused."

No. 12.

The Court charges the jury for the plaintiff that there is no evidence authorizing the jury to find that plaintiff assumed the risk of his injury in this case.

"Refused."

151 No. 13.

The Court charges the jury that the plaintiff had the legal right to bring his suit in Clarke County, Miss. or any other County through which the railroad passes.

"Given."

Filed March 21, 1916. John W. McNeal, Clerk.

152 No. 1.

The Court instructs the jury that if you find for the defendant the form of your verdict may be, "We the jury find for the defendant."

"Given."

No. 2.

The Court instructs the jury, for the defendant, that the railroad company is under no obligation to provide a track that is perfectly level or free from grades, and that the only duty which the railroad company owed to the plaintiff in that regard was that the track should be reasonably safe for engines and trains, and the mere fact that the accident happened on a grade and that the grade required a heavier pull by the engine and made an extra strain on the King pin and the coupling apparatus does not entitle the plaintiff to a verdict.

"Given."

No. 3.

The Court instructs the jury, for the defendant, that the burden is upon the plaintiff to prove to your satisfaction, by a preponderance of the testimony, all the material allegations of his declaration, and unless he has done this to your satisfaction it is your sworn duty to return a verdict for the defendant.

"Given."

153

No. 4.

The Court instructs the jury, for the defendant, that where all the facts and circumstances attending an accident and injury are in evidence, it is the duty of the jury to determine from the testimony before them whether or not there was any negligence on the part of the defendant proximately causing such accident and injury and not from any presumption based upon any statute and if the testimony in this case shows how the accident and injury happened, then it is your duty to determine whether or not the defendant was negligent from the testimony and not from any statutory presumption; and unless you believe from a preponderance of all the testimony that the defendant was negligent and that this negligence proximately caused the injury, then it is your duty to return a verdict for the defendant.

"Given."

No. 5.

The Court instructs the jury for the defendant that the burden is upon the plaintiff to prove to your satisfaction by a preponderance of the evidence that the King pin which broke was defective before he could rely upon that, and the mere fact that the pin broke does not warrant the jury in finding that the pin was defective, but in determining this fact the jury should consider all the facts and circumstances in evidence.

"Given."

154

No. 6.

The Court instructs the jury, for the defendant, that this being a suit under the Federal Employers' Liability Act, the plaintiff is not entitled to the benefit of the Mississippi prima facie statute, and that the mere fact that the injury was caused by a running train is not prima facie evidence of negligence on the part of the railroad company in this case.

"Refused."

No. 7.

The Court instructs the jury that this case is governed by the Federal Employers' Liability Act, and that, under the testimony and the law of the case as contained in said act of Congress, the defendant is not liable to the plaintiff, and *hou* should return a verdict for the defendant.

"Refused."

No. 8.

The Court instructs the jury, for the defendant, that under the Federal Employers' Liability Act, which is the law of this case, the defendant railroad company was not an insurer of the life of the

plaintiff, its employee, and the defendant railroad company was not under any obligation to furnish to the plaintiff, its employee, the safest possible appliances, but was only under the duty and obligation to furnish the plaintiff with reasonably safe appliances, and was only under the duty and obligation to exercise ordinary care to furnish such appliances and in inspecting the same and unless you believe from the evidence that the railroad company failed to exercise ordinary care to furnish the plaintiff with appliances that were reasonably safe, then it is your duty to return a verdict for the defendant.

"Refused."

155 No. 9.

The Court instructs the jury for the defendant, that although you may believe from the testimony that if the King pin that held the coupler bar between the engine and the tender had been larger than the one that was in use that it would not have broken and the accident would not have happened, still, if you further believe from the evidence that the King pin which was in use was reasonably safe and sufficient for the purpose for which it was used; then the railroad company was under no obligation to replace this pin with a larger pin, and you are not authorized on that account to return any verdict in favor of the plaintiff.

"Refused."

No. 10.

The Court instructs the jury for the defendant that if you believe from the evidence that Scarlet knew before his injuries that the tender and engine of 26) were liable to pull apart while starting the double header up the grade at Talawa and that notwithstanding such knowledge he continued to ride on the engine with one foot on the engine and one foot on the tender, then under the Federal Employers' Liability Act he assumed the risk thereof and you should return a verdict for the defendant.

"Refused."

Filed March 21, 1916. John W. McNeal, Clerk.

156 No. 11.

The Court instructs the jury, for the defendant, that the burden is upon the plaintiff to show that the defendant was negligent in failing to equip the engine 260 with a draw bar pin or King pin that was reasonably safe and sufficient to prevent the engine and the tender from pulling apart in the operation of said engine and the train which it was pulling, and unless the plaintiff has shown this to your satisfaction, then it is your duty to return a verdict for the defendant.

"Refused."

No. 12.

The Court instructs the jury for the defendant that under the Federal Employers' Liability Act, the defendant railroad company was only under the duty and obligation to use reasonable care to equip the engine 260 upon which the plaintiff was riding on engine with a draw bar pin or king pin that was reasonably safe and sufficient for the purpose for which it was used, and unless you believe from the testimony that the defendant negligently failed to do this then you should return a verdict for the defendant.

"Refused."

Filed March 21, 1916. John W. McNeal, Clerk.

157 We the jury find for the Plaintiff and assess damages at ($2500.00) Twenty-five Hundred Dollars.

158 JOE SCARLET

v.

NEW ORLEANS & NORTHEASTERN RAILROAD CO.

This cause coming on to be heard and issue being joined come a jury of good and lawful men to-wit, G. L. Sellers and eleven others, who, having heard the evidence and receiving the instructions of the court, retired to consider of their verdict and presently returned into open court the following verdict: "We the jury find for the plaintiff and assess his damages at Twenty-five Hundred Dollars."

It is therefore the judgment of the Court that the plaintiff Joe Scarlet do have and recover of the defendant the New Orleans & Northeastern R. R. Co., a corporation, the sum of Twenty-five Hundred Dollars, together with all costs, for which let execution issue.

To which verdict and judgment of the court the defendant in open court excepts.

M. B. "E" P. 232.

159 Number 1703.

JOE SCARLET

v.

NEW ORLEANS & NORTHEASTERN RAILROAD COMPANY.

Be it remembered that on the trial of this cause this day, in the Circuit Court of Clarke County, Mississippi, and during the taking of the testimony before the jury, the Plaintiff testified that he was examined by Dr. W. W. Reynolds, surgeon for the defendant, soon after he received the injury complained of and while he was still in bed as the result thereof and was treated for said injuries by the said

doctor for the period of forty-one days, and that he was examined and treated for said injuries also, by Dr. T. J. Smith, and was also examined by Dr. J. D. Shipp. The said plaintiff introduced the said Dr. Smith and the said Dr. Shipp as witness for the plaintiff, and also, one Dr. J. H. Rush, who took an X-ray picture of plaintiff's injuries, and had said witnesses testify as to the plaintiff's injuries.

And thereupon, the defendant offered as a witness, before the jury, said Dr. W. W. Reynolds, and offered to prove by the said Dr. Reynolds, his knowledge as to the injuries of the plaintiff and the character and extent thereof. But the court, upon the motion of the plaintiff, declined and refused to permit the said witness to testify before the jury as to his knowledge of the plaintiff's injuries or the character or the extent thereof; the plaintiff having objected to such testimony as being privileged under Section 3695 of the Mississippi Code 1906; and the court, upon the motion and objection of the plaintiff, further declined to permit the defendant's attorneys in the presence and hearing of the jury to ask said witness Reynolds, to state what he knew with reference to the injuries sustained by the plaintiff and the character and extent thereof, or any other question tending to elicit from said witness, any answer as to his knowledge of plaintiff's injuries, or the character or extent thereof, to all of which the defendant then and there excepted, and to which action
160 of the court the defendant now excepts for the reason that the said action of the court deprives the defendant of the right of trial by jury guaranteed to it by the constitution of the United States in cases governed by, and brought under, the act of Congress known as the Federal Employers' Liability Act, and because it deprives the Defendant of its property without due process of law, and denies to it the equal protection of the Laws, in violation of the Constitution of the United States and, particularly, the Fourteenth Amendments thereof.

In testimony whereof, witness the signature of the Honorable Judge of said Court presiding, before the case is submitted to the jury, this 21st day of March, 1916.

R. W. HEIDELBERG, *Judge.*

Filed March 21st, 1916. John W. McNeal, Clerk.

161 No. 1703.

JOE SCARLET

v.

NEW ORLEANS & NORTHEASTERN RAILROAD COMPANY

Be it remembered that on the argument of this case and in the closing argument for plaintiff the plaintiff's attorney, T. G. Fewell, argued and stated to the jury that statistics show that there are thousands of personal injur-es on the railroad of this country every year and that they only pay out a few dollars per train mile for such

injuries and yet they go belly aching all over the country because they are sued; to which the defendant then and there ex-epted as an improper argument, which objection was overruled by the court, to which the defendant then and there excepted. Thereupon, the said attorney for the plaintiff further argued and stated to the jury that the only way to stop the injuring of railroad employees was for the jury to render good verdicts against the railroad company as recommended by the interstate commerce commission in its report to congress, to which the defendant then and there excepted as being an improper argument; which objection the court then and there overruled, to which action of the court the defendant then and there excepted.

In witness whereof this special bill of exceptions is signed this March 21st 1916.

R. W. HEIDELBERG, *Judge.*

Filed March 21, 1916. John W. McNeal, Clerk.

162 No. 1703.

JOE SCARLET

v.

NEW ORLEANS & NORTHEASTERN RAILROAD CO.

Be it remembered the defendant comes in open court before the jury retires to consider their verdict and in open court excepts to the action of the court in refusing each and every one of the instructions asked by the defendant and refused by the court; and also and further excepts to the action of the court in giving each and every one of the instructions asked by the plaintiff and given by the court, all of which refused and given instructions are so marked and filed among the papers in this case. In testimony whereof this special bill of exceptions is signed by the judge of this court presiding this 21st day of March 1916.

R. W. HEIDELBERG, *Judge.*

Filed March 21, 1916. John W. McNeal, Clerk.

163 *Appeal Bond to Supreme Court.*

THE STATE OF MISSISSIPPI,
Lauderdale County:

Know all men by these presents: That we, New Orleans & Northeastern Railroad Co., Principal, and United States Fidelity & Guaranty Co., surety, are held and firmly bound unto Joe Scarlet in the penal sum of Five Thousand and No/100 Dollars, for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents, the 26th day of April, A. D. 1916.

That condition of the above obligation is such, That whereas, in a case lately pending in the Circuit Court of Clarke County, wherein Joe Scarlet was Plaintiff, and New Orleans & Northeastern Railroad Co. was defendant, a judgment was rendered on the 21st day of March, 1916, a day of the March Term, 1916, of said Circuit Court of said County, in favor of said Joe Scarlet against said New Orleans & Northeastern Railroad Co. for the sum of Twenty-five Hundred Dollars, and the said New Orleans & Northeastern Railroad Co., conceiving itself aggrieved thereby hath prayed for and obtained an appeal to revise and reverse said judgment, returnable to the next Term of our Supreme Court.

Now, therefore, if the said obligors shall pay and satisfy the judgment of the Supreme Court and all costs of said appeal, and of the Court below, in case the judgment be affirmed, then this obligation to be void, otherwise to remain in full force and effect.

NEW ORLEANS & NORTHEASTERN RAILROAD CO., [SEAL.]

By A. S. BOZEMAN, *Atty.*

UNITED STATES FIDELITY & GUARANTY CO., [SEAL.]

By —— ——, *Attorney in Fact.*

Approved, 27th day of April, 1916.

[SEAL.] By JOHN W. McNEAL, *Clerk.*

164 STATE OF MISSISSIPPI,
Clarke County:

I, John W. McNeal, Clerk of the Circuit Court in and for said County and State do hereby certify that the foregoing pages contain a true and correct copy of the record in the case of Joe Scarlet versus the New Orleans & Northeastern Railroad Co., said record now being on file in my office in the town of Quitman, County of Clarke and State of Mississippi.

Given under my hand and official seal of said Court this the 26th day of May, A. D. 1916.

[SEAL.] JOHN W. McNEAL,
Clerk of the Circuit Court of Clarke County.

165 1703.

JOE SCARLET

v.

NEW ORLEANS & NORTHEASTERN RAILROAD CO.

It is agreed that the original X-ray plate or picture introduced in evidence by the Plaintiff in connection with the testimony of Dr. J. H. Rush may be transmitted by the Clerk of the Circuit Court to

the Clerk of the Supreme Court for the inspection of that Court in connection with the Transcript of the record on the hearing of the appeal in said cause.

This 15th day of June, 1916.

FEWELL & CAMERON,
Plaintiff's Attorneys.
A. S. BOZEMAN,
B. F. CAMERON, Jr.,
Defendant's Attorneys.

166–67 No. 19342.

In the Supreme Court of Mississippi, October Term, 1916.

New Orleans & Northeastern Railroad Co., Defendant and Appellant,

v.

Joe Scarlet, Plaintiff and Appellee.

Assignment of Errors.

The Appellant, New Orleans & Northeastern Railroad Company, shows to the court that there are divers errors to its prejudice, apparent of record herein, and of said errors it assigns the following as causes of reversal of the judgment from which the appeal is prosecuted, to wit:

1. The court below erred (see special bill of exceptions, record pp. 159, 160) in declining to permit the defendant railroad company's counsel to examine Dr. R. W. Reynolds and to prove by him his knowledge as to the injury suffered by plaintiff and the character and extent thereof, the court below erroneously holding that the witness Reynolds was not a competent witness by whom to make such proof because of sec. 3695, Mississippi Code of 1906.

2. The court below erred in granting each and every one of the instructions granted at the request of the plaintiff. This assignment is directed to each of said instructions separately and not to them jointly.

3. The court below erred in refusing each and every one of the instructions requested by the defendant and refused by the court. This assignment is directed to each of said instructions separately and not to them jointly.

4. The court below erred in permitting the plaintiff's attorney, in his closing argument to the jury, to use language and make statements not justified by the record, and in overruling the defendant's objection thereto, as shown (record p. 161) by the special bill of exceptions filed thereto.

168 Wherefore, the appellant, defendant, hath appealed to this court and prays for a judgment reversing the judgment of the court below and awarding appellant a new trial.

And as in duty bound appellant will ever pray.

A. S. BOZEMAN,
R. H. & J. H. AND
FULTON THOMPSON,
Attorneys for Appellant.

A copy of the above and foregoing assignment of errors has this day been forwarded by mail, postage prepaid, addressed to Messrs. Fewell & Cameron, attorneys for appellee, at Meridian, Mississippi, their usual place of residence and postoffice address.

Done October 6, 1916.

R. H. THOMPSON,
Of Counsel for the Appellant.

169 *Judgment.*

In the Supreme Court of Mississippi, March Term, 1917, Monday, June 4th, 1917.

19342.

NEW ORLEANS & NORTH EASTERN R. R. CO.

vs.

JOE SCARLET.

This cause having been submitted on a former day of this term on the record herein from the Circuit Court of Clarke County and the Court having sufficiently examined and considered the same, and being of opinion that there is no error therein, doth order and adjudge that the judgment of said Circuit Court rendered in said cause at the March term 1916, on the 21st day of March, 1916, be and the same is hereby affirmed, and that the appellee do have and recover of appellant and The United States Fidelity & Guaranty Company surety in the supersedeas bond the sum of two thousand five hundred dollars, the amount of the judgment in the court below together with the further sum of one hundred and twenty five dollars, being damages at the rate of five per centum as allowed by law; as well as interest on the amount of said judgment at the rate of six per centum per annum, and also the costs of this cause in this court and in the court below to be taxed &c.

170 *Opinion of the Court.*

Division "A"—Smith, C. J.

#19342.

N. O. & N. E. R. R. Co.

vs.

Joe Scarlet.

Sec. 1985, Code 1906, amended by Chapter 215, Laws of 1912, as construed in Railroad Company v. Thornhill, 106 Miss. 387, deals not with a substantial right but only with a rule of evidence, Lumber Co. v. Pierce, 106 Miss. 672; 235 U. S. Sup. Ct. Rep. 380, 59 L. Ed. 279, and since the lex fori governs in all matters of procedure, the court below committed no error in charging the jury in accordance therewith.

We cannot review the exclusion by the court below of certain testimony sought to be elicited by appellant from Dr. Reynolds on his examination in chief: for the reason that while the record discloses the questions sought to be propounded to the witness, it does not disclose that his answers thereto would have been so that we may judge of the materiality and relevancy thereof to the issue being tried, and if material, whether appellant was prejudiced by the exclusion thereof. Railroad Company v. Robinson, 106 Miss. 896.

We find no reversible error in the other matters complained of.

Affirmed.

171 In the Supreme Court of Mississippi.

No. 19342.

New Orleans and Northeastern Railroad Company, Appellant,

vs.

Joe Scarlet, Appellee.

Suggestion of Error.

The Appellant, the New Orleans and Northeastern Railroad Company, suggests that there is error in the judgment and opinion rendered in this case on June 4, 1917, in the failure of this Court to hold that the action of the trial Court, in refusing to allow Appellant to propound, in the presence of the jury, to its witness Dr. W. W. Reynolds, questions touching his knowledge of the character and extent of plaintiff's injuries, was error. This point was urged in our original brief but same was not mentioned in the opinion of the Court and we feel constrained, because of the importance of the ques-

tion, and the highly prejudicial effect it would logically have on the decision of this case, to present it again to the Court.

This Court held, in its opinion, that it would not review the exclusion of this testimony by the trial Court because it was not advised as to its materiality. The question here presented arises independently of the materiality vel non of the testimony. It has not to do with the exclusion of the testimony, but with the manner of the exclusion.

172 The circumstances surrounding the offering of this testimony, as gleaned from the record, were these: Plaintiff testified that he had several doctors, among whom, the first (with the exception of Dr. Bufkin who rendered only temporary attention) was Dr. Reynolds; that the latter was the Surgeon for the Appellant; that Dr. Reynolds treated him forty-one days and that he then went to an osteopath and subsequently to Dr. Smith and to Dr. Shipp and to Dr. Rush (the last-named doctor making an X-ray photograph of the injury). Plaintiff introduced every one of the doctors who attended him except Dr. Reynolds who was in the employ of the other party to the suit.

All of the doctors introduced by plaintiff examined and treated him after a period of about a month and a half had elapsed since the injury. Their opportunity to learn the true situation, to determine the real character and extent of the injuries, was, therefore, not good. One had not heard, after listening to them, any testimony as to the nature and extent of the injuries, which formed the basis of this litigation, *as* the time that they were inflicted or for considerably more than a month thereafter. The man who o-ght to be able to tell accurately and graphically of these injuries was the one who had examined and ministered unto them while they were fresh and susceptible of intelligent d-agnosis. The one man*y* who could satisfy the natural yearning all felt for enlightenment on this point, was he who, as an expert, examined the injured man while he was still abed, and who administered the treatment which enabled him to throw aside his sticks. All eyes turned to him for enlightenment; all waited his turn on the stand to learn the truth.

And what happened when Dr. Reynolds took the stand? Was the jury enlightened by him? Did he tell them just what he found when he stripped and examined plaintiff? (page 140) shortly after he was injured, and did they get the benefit of his expert knowledge gained during those forty-one days he was treating him? No, not a word. Dr. Reynolds, the surgeon for the New Orleans & Northastern Railroad Company, Appellant, the only man in position

173 to enlighten the jury, did not tell them a word of what they were waiting to know.

And whose fault was it that the jury was denied the right to this all important testimony? As far as the jury knew (See page 140 et seq.) appellant never gave him a chance to tell what he knew. It was not the duty of Scarlet to elicit this information from a doctor who was in the employ of the other litigant. It was the duty of the Railroad Company, appellant,—Qui tacent, clamant.

And who will say that this situation was not highly prejudicial to

Appellant's rights? The only logical inference which coood be drawn from Appellant's failure (as it appeared to the jury) to have its witness testify concerning the facts so material and germane to the issue is that the facts, if stated, would do it harm. The only conclusion fairly deducible from Appellant's actions (as manifested to the jury) was that Dr. Reynolds would have testified that Scarlet's injuries were as bad as or worse then others depicted them. If Appellant had been able (as the Jury inevitably thought) to refute plaintiff's testimony about the seriousness of his injuries, it would have done so by its surgeon who took the stand to testify in its behalf. Its failure is a tacit admission, the force of which it would be hard to overestimate.

And this situation was presented to the jury in an entirely false light. Plaintiff had the right to claim his privilege but Appellant is equally entitled to its right to have the jury know that it did not hide from them this very vital testimony, but wanted to place it before them. Fairness demanded that this be done,—that this very important matter be placed before the jury in the true, not the false, light.

174 The Court below refused this right to Appellant; refused to allow any step to be taken which would enable the jury to be advised that the Appellant was not hiding the facts, of which its witness was the only one cognizant, from them. This, we submit was error on the part of the trial court, and by no means harmless error; but one which amply warrants the reversal of this case.

For this reason we respectfully submit that this Suggestion of Error should be sustained, that the order entered by this Court affirming the judgment of the lower Court should be set aside and the case reversed and remanded for a new trial.

Respectfully submitted,

A. S. BOZEMAN AND
BEN F. CAMERON, JR.,
Attorneys for Appellant.

175 In the Supreme Court of Mississippi.

No. 19342.

NEW ORLEANS & NORTHEASTERN RAILROAD COMPANY, Appellant,

vs.

JOE SCARLET, Appellee.

Petition for Writ of Error to the United States Supreme Court.

To the Honorable Sydney Smith, Chief Justice of the Supreme Court of Mississippi:

The New Orleans & Northeastern Railroad Company and the United States Fidelity & Guaranty Company of Baltimore, Petitioners, present this their petition for a writ of error to the Supreme Court of the United States in the above-entitled case and respectfully show

that on the fourth day of June, 1917, the Supreme Court of Mississippi rendered a final judgment for the principal sum of Twenty-Five Hundred Dollars ($2,500.00) adding thereto a Statutory Penalty of One Hundred and Twenty-Five Dollars ($125.00), and interest on the principal, One Hundred and Eighty-One Dollars ($181.00), aggregating Two Thousand Eight Hundred and Six Dollars ($2,806.00) and costs, in favor of Joe Scarlet, Appellee, in the above-entitled case, and against the New Orleans & Northeastern Railroad Company, Appellant therein, and against the petitioner the United States Fidelity & Guaranty Company of Baltimore, the surety of the petitioner, the New Orleans & Northeastern Railroad Company, on its appeal bond, whereby the said case was appealed from the State Court of original jurisdiction to the Supreme Court of Mississippi, and by its final judgment the Supreme Court of Mississippi awarded execution thereon against your petitioners, and afterwards, to-wit, on the 2d day of July, 1917, the said Supreme Court of Mississippi overruled and denied your petitioner's the New Orleans & Northeastern Railroad Company's suggestion of error in said cause, all of which will appear by reference to the record and proceedings in said cause, the same being numbered 19342 on the docket and record of the Supreme Court of Mississippi, which last-mentioned Court
176–77 is the highest Court of the State in which a decision in said suit can be had.

Your petitioners claim the right to remove the record in said case to the Supreme Court of the United States by writ of error under Section 237 of the Judiciary Code; 36 Stat. 1156; because there was drawn in question in said case the true construction of an act of Congress, commonly called the Federal Employers' Liability Act, 35 Statutes at Large, page 65, approved April 22nd, 1908, and of the acts of Congress amending same, and the Supreme Court of Mississippi denied petitioners, as we respectfully submit, their rights, privilege and immunity under said acts of Congress in this, that it, the said Supreme Court of Mississippi, held and adjudged that it was not error prejudicial to petitioner railroad company for the trial court to have given in charge to the jury, as was done, instructions on the trial of the case, propounding a statute of Mississippi, com-only called the prima facie statute, Mississippi Code 1906, Section 1985, as amended by Chapter 215, Laws of Mississippi 1912; which statute relates to the burden of proof and provides that in all actions against railroad corporations and other corporations, companies, etc., using engines, locomotives or cars of any kind propelled by the dangerous agencies of steam, electricity, gas, gasoline or lever power, and running on tracks, for damages done to persons or property, proof of injury inflicted by the running of the engines, locomotives or cars of any such railroad corporation or company shall be prima facie evidence of the want of reasonable skill and care of such railroad corporation or company in reference to such injury; whereas, as petitioners believe and insisted and now insist that in this suit brought under the Federal Employers' Liability Act it was prejudicially erroneous to your petitioner the New Orleans & Northeastern Railroad Company, for said state statute to have been given in charge to

the jury, and your petitioners believe and respectfully submit that the rightfulness of the giving of said instructions presen-s a Federal question, pure and simple, and one which should be finally determined by the Supreme Court of the United States.

178 And the said judgment of the Supreme Court of Mississippi denied the petitioner, the New Orleans & Northeastern Railroad Company, its rights and privil-ges under the Constitution and laws of the United States and in violation of the provisions of said Federal Employers' Liability Act and of the Fourteenth Amendment of the Constitution of the United States providing that no State shall deprive any person of life, liberty or property without due process of law, nor deny any person within its jurisdiction the equal protection of the law; all of which is fully apparent in the record of the proceedings of the Supreme Court of Mississippi in said cause, which record is herewith submitted, and in the assignment of Errors filed herewith.

Wherefore, petitioners pray the allowance of a writ of error with supersedeas, returnable to the Supreme Court of the United States, and for citation and supersedeas, that the errers complained of may be reviewed by the Supreme Court of the United States.

And as in duty bound petitioners will ever pray.

NEW ORLEANS & NORTHEASTERN RAILROAD COMPANY, *Petitioner,*

By J. BLANC MONROE,
A. S. BOZEMAN AND
B. F. CAMERON, JR.,
Its Attorneys of Record.

Let the writ of error with supersedeas issue as prayed for in above petition, upon plaintiffs in error giving bond in the penalty of Six Thousand Dollars ($6,000) conditioned as the law directs.

Given under my hand this 6th day of July, 1917.

SYDNEY SMITH,
Chief Justice of the Supreme Court of Mississippi.

179 *Appeal Bond.*

THE UNITED STATES OF AMERICA,
State of Mississippi, County of Lauderdale:

Know all men by these presents, That we, the New Orleans & Northeastern Railroad Company and the United States Fidelity & Guaranty Company of Baltimore, as Principals, and Fidelity and Deposit Co. of Maryland, a surety company authorized by the laws of the United States and the State of Mississippi to become surety on appeal bonds, as surety, are held and firmly bound unto Joe Scarlet in the penal sum of Six Thousand Dollars ($6,000) to be paid to the said obligee, his heirs, executors, administrators or successors and to the payment

of which well and truly to be made we bind ourselves and our successors, jointly and severally firmly by these presents, sealed with our seals and dated this the 6th day of July, 1917.

The condition of this obligation is such that whereas the above named plaintiffs in error, the New Orleans & Northeastern Railroad Company and the United States Fidelity & Guaranty Company of Baltimore, have prosecuted a writ of error in the Supreme Court of the United States to reverse the judgment rendered by the Supreme Cour- of Mississippi in the case Numbered 19342 on the dockets and in the records of the last-mentioned Court, wherein Joe Scarlet is plaintiff and the said Railroad Company is defendant and the United States Fidelity & Guaranty Company of Baltimore was its surety on its appeal bond by which the case was carried from the state court of original jurisdiction to the said State Supreme Court and the judgment of the said state Supreme Court was a joint one against both of the principal obligators herein.

Now, if the above-named plaintiffs in error, the New Orleans & Northeastern Railroad Company and the United States Fidelity & Guaranty Company of Baltimore shall prosecute the said writ of error to effect and answer all costs and damage, if they shall fail to make good their plea, then this obligation shall be void, otherwise it
180 shall remain in full force and effect.

NEW ORLEANS & NORTHEASTERN RAILROAD COMPANY,

By A. S. BOZEMAN,
Attorney of Record.

UNITED STATES FIDELITY & GUARANTY COMPANY OF BALTIMORE,

By A. S. BOZEMAN,
Attorney of Record.

FIDELITY & DEPOSIT COMPANY OF MARYLAND,

By J. C. HOOD,
Attorney in Fact.

The above bond and sureties approved July 6th, 1917.

SYDNEY SMITH,
Chief Justice of Supreme Court of Mississippi.

(Seal of Fidelity & Deposit Company.)

181–82

(General, 1915.)

Duplicate.

Tax Paid on Original.

Power of Attorney.

Fidelity and Deposit Company of Maryland.

Home Office: Baltimore, Maryland.

Know all Men by *the* Presents:

That the Fidelity and Deposit Company of Maryland, by Fred S. Axtell, its Vice-President, and Edwin Warfield, Jr., its Assistant Secretary, in pursuance of authority granted by Article VI, Section 3, of the By-Laws of said Company, a copy of which section is hereto attached, does hereby nominate, constitute and appoint J. C. Hood, of the City of Jackson, State of Mississippi, its true and lawful agent and attorney in fact, to make, execute, seal and deliver for and on its behalf, as surety, and as its act and deed, any and all bonds and undertakings required in the State of Mississippi. And the execution of such bonds or undertakings in pursuance of these presents, shall be as binding upon said Company, as fully and amply, to all intents and purposes, as if they had been duly executed and acknowledged by the regularly elected officers of the Company at its office in Baltimore, Maryland, in their own proper persons by the regularly elected officers of the Company at its office in Baltimore, Maryland, in their own proper persons.

In Witness Whereof, the said Fred S. Axtell, Vice-President, and Edwin Warfield, Jr., Assistant Secretary, have hereunto subscribed their names and affixed the Corporate Seal of the said Fidelity and Deposit Company of Maryland, this 25th day of January A. D. 1916.

(Signed and Sealed.) FRED S. AXTELL,
Vice-President.

Attest:
E. WARFIELD, JR.,
Assistant Secretary.

STATE OF MARYLAND,
City of Baltimore, ss:

On this 25th day of January A. D. 1916 before the subscriber, a Notary Public of the State *or* Maryland, in and for the City of Baltimore, duly commissioned and qualified came Fred S. Axtell, Vice-President and Edwin Warfield, Jr., Assistant Secretary, of the Fidelity and Deposit Company of Maryland, to me personally
183 known to be the individuals and officers described in and who executed the preceding instrument, and they each acknowledge

the execution of the same, and being by me duly sworn, severally and each for himself deposeth and saith, that they are the said officers of the Company aforesaid, and that the seal affixed to the preceding instrument is the Corporate Seal of said Company, and that the said Corporate Seal and their signature- as such officers were duly affixed and subscribed to the said instrument by the authority and direction of the said Corporation.

In Testimony Whereof, I have hereunto set my hand and affixed Official Seal, at the City of Baltimore, the day and year first above written.

WM. M. REINHARDT,
Notary Public.

Commission expires May 1st, 1918.

Extract from By-Laws of the Fidelity and Deposit Company of Maryland, adopted by the Stockholders of said Company on January 19*ty*, 1915.

"Article VI, Section 3. The President, or any of the Vice-Presidents, elected by ballot from the members of the Board of Directors, shall have power by and with the concurrence of the Secretary or any one of the Assistant Secretaries or Additional Assistant Secretaries, to appoint any attorney-in-fact or to authorize any person or persons to execute on behalf of the Company any bonds, recognizances, stipulations, undertakings, deeds, releases of mortgage contracts, agreements, and policies, and to affix the seal of the Company thereto."

I, Edwin Warfield, Jr., Assistant-Secretary of the Fidelity and Deposit Company of Maryland, hereby certify that the aforegoing is a true copy of Article VI, Section 3, of the By-Laws of said Company, and is still in force.

184 In testimony whereof, I have hereunto subscribed my name as Assistant Secretary, and affixed the Corporate Seal of the Fidelity and Deposit Company of Maryland, this 25th day of January A. D. 1916.

(Signed and Sealed.) EDWIN WARFIELD, JR.,
Assistant Secretary.

Certificate.

I, Frank P. Welsh, Assistant Secretary of the Fidelity and Deposit Company of Maryland do hereby certify that the attached power of attorney dated January 25, 1916, in behalf of J. C. Hood, of Jackson, Miss., is a true and correct copy and that same is still in force.

In testimony whereof I have hereunto subscribed my name and affixed the corporate seal of the said Company this 29th day of December 1916.

(Signed) FRANK P. WELSH,
Assistant Secretary.

185 THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Supreme Court of Mississippi, Greetings:

Because in the record and proceedings and also in the rendition of judgments, of a plea which is in the said Supreme Court of Mississippi before you, or some of you, being the highest Court of law or equity of the said state in which a decision could be had in said case between Joe Scarlet, the plaintiff in the Court of original jurisdiction, and the New Orleans & Northeastern Railroad Company, the defendant in said Court, and the United States Fidelity & Guaranty Company of Baltimore, surety on the appeal bond given by the said railroad company to appeal said cause from the Court of original jurisdiction to the Supreme Court of Mississippi, decided by the Supreme Court of Mississippi against said Railroad Company and the said surety on its bond, wherein was drawn in question in said suit the proper construction of an act of Congress, commonly designated as the Employers' Liability Act, 35 Federal Statutes at Large, page 65, and the amendments thereto, and in the giving in charge to the jury by the Court of original jurisdiction and the approval thereof by the Supreme Court of Mississippi of a statute of the State of Mississippi, Mississippi Code 1906, Section 1985, as amended laws 1912, page 290, ch. 215, relating to the burden of proof, manifest error happened to the great damage of the New Orleans & Northeastern Railroad Company and to the United States Fidelity & Guaranty Company of Baltimore, surety on its said appeal bond, as by their complaint appears.

We being willing for the error, if any hath been, to be duly corrected, and full and speedy justice done to the parties in this behalf, do command you if judgment be therein given, that then under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same in the said Supreme Court at Washington within thirty days from the date hereof, that the record and
186 proceedings aforesaid be inspected, and that the said Supreme Court of the United States may cause further to be done therein, to correct that error, what of right according to the laws and customs of the United States should be done.

Witness the Honorable Edward Douglass White, Chief Justice of the United States, the 6 day of July, in the year of our Lord One Thousand Nine Hundred and Seventeen.

[Seal U. S. District Court, Southern District of Mississippi.]

L. B. MOSELEY, *Clerk,*
Clerk of the United States District
Court for Southern District of Miss.
B. L. TODD, JR.,
Chief Deputy Clerk.

Allowed, to operate as a supersedeas by

SYDNEY SMITH,
Chief Justice of the Supreme Court of Miss.

187 UNITED STATES OF AMERICA, *ss:*

To Joe Scarlet or Thomas G. Fewell & Charles B. Cameron, His Attorneys of Record, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States at Washington City, within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's office of the Supreme Court of Mississippi, wherein the New Orleans & Northeastern Railroad Company and the United States Fidelity & Guaranty Company of Baltimore are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment against the said plaintiffs in error as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Sydney Smith, Chief Justice of the Supreme Court of the State of Mississippi this the 6th day of July in the year of our Lord One Thousand Nind Hundred and Seventeen.

SYDNEY SMITH,
Chief Justice of the Supreme Court of the State of Mississippi.

STATE OF MISSISSIPPI,
County of Lauderdale,
City of Meridian:

On this the 7th day of July, 1917, personally appeared before me, a Notary Public in and for the said City, County and State, D. B. Holmes, Jr., who makes oath and says that he delivered a true copy of the above and foregoing citation to Thomas G. Fewell and Charles B. Cameron, Attorneys of Record for Joe Scarlet, on the 7th day of July, 1917.

D. B. HOLMES, JR.

Sworn to and subscribed before me this the 7th day of July, 1917, as witness my hand and official seal.

[Seal of Ben. F. Cameron, Jr., Notary Public, Dist. No. 1, Lauderdale Co., Miss.]

BEN F. CAMERON, JR.,
Notary Public for City of Meridian, Lauderdale County, Miss.

188–89 *Assignment of Errors.*

In the Supreme Court of the United States.

NEW ORLEANS & NORTHEASTERN RAILROAD COMPANY et al., Plaintiffs in Error,

vs.

JOE SCARLET, Defendant in Error.

Writ of Error to the Supreme Court of Mississippi.

The plaintiffs in error, the New Orleans & Northeastern Railroad Company and the United States Fidelity & Guaranty Company of Baltimore, show to the Court that there are manifest errors prejudicial to them, apparent of record in the proceedings, decision and final judgment in the Supreme Court of Mississippi, in the above-entitled matter and case, in this, to wit:

The Supreme Court of Mississippi erred in deciding and holding that the giving in charge to the jury by the Court of original jurisdiction of the statute of the State of Mississippi, Code 1906, Section 1985, as amended laws of Mississippi 1912, page 290, ch. 215, providing that in suits against railroad companies for injury to person or property proof that the injury was inflicted by the running of cars or locomotives of the defendant company should be prima facie evidence of liability, and placing the burden of proof to show non-liability on the defendant company, was not error prejudicial to the railroad company, plaintiff in error. And it so erred because this was a suit, as shown of record, brought under the act of Congress, commonly do*moni*-ated the Employers' Liability Act, 35 U. S. Statutes at Large 65, and the act of Congress amendatory thereof. And by said ruling the Supreme Court of Mississippi disregarded the manifest purpose of Congress that the said acts of Congress should be uniformly construed and enforced in suits brought thereunder in all parts of the Union where such suits are brought in the Courts of the several states, as well as in the Federal Courts.

In said particulars the Supreme Court of Mississippi denied to plaintiffs in error their rights under said acts of Congress and under the Constitution and laws of the United States.

190 Especially did the Court deny plaintiffs in error the equal protection of the law under the said Federal Statute, in violation of the provisions of said statute and of the Fourteenth Amendment to the Constitution of the United States, providing that no state shall deprive any person of life, liberty or property without due process of law or deny to any person within its jurisdiction the equal protection of the law.

Plaintiffs in error, therefore, pray a reversal of the final judgments of the Supreme Court of Mississippi in this cause and for the dismissal of the suit; but should the Court fail to find the

dismissal of the suit warranted by the record, then plaintiffs in error pray for the reversal of the judgments of the Supreme Court of Mississippi and the award of a new trial, so that justice may be done.

And as in duty bound plaintiffs in error will ever pray.

A. S. BOZEMAN,
B. F. CAMERON, JR.,
Attorneys for the Plaintiffs in Error.

191 *Clerk's Certificate.*

STATE OF MISSISSIPPI,
Hinds County:

I, George C. Myers, Clerk of the Supreme Court of Mississippi, being the Court of said State which has highest, last and final jurisdiction of all pleas and causes pending in the Courts of said State, do hereby certify that the foregoing are true full and correct copies of the papers, each and all of them constituting the record in the said Supreme Court of the State of Mississippi in the case of New Orleans & North Eastern Railroad Company vs. Joe Scarlet, No. 19342 on the docket of said Court; all of which are now on file in my office, and which taken together, constitute the record in said Supreme Court of Mississippi.

Given under my hand and seal of said Supreme Court of Mississippi at Jackson, in the State of Mississippi, on this the 30th day of July in the year of Our Lord One Thousand Nine Hundred and Seventeen, and in the one hundred and forty first year of the Independence of the United States of America.

[Seal Supreme Court, State of Mississippi.]

GEO. C. MYERS,
Clerk Supreme Court of Mississippi.

I further certify that in obedience to the writ of error filed in this cause I have this day forwarded to Hon. Jas. D. Maher, Clerk Supreme Court of the United States, Washington, D. C. by express prepaid the transcript of the record in the above cause.

[Seal Supreme Court, State of Mississippi.]

GEO. C. MYERS,
Clerk Supreme Court of Miss.

Endorsed on cover: File No. 26,091. Mississippi Supreme Court. Term No. 624. New Orleans & Northeastern Railroad Company and United States Fidelity & Guaranty Company, plaintiffs in error, vs. Joe Scarlet. Filed August 14th, 1917. File No. 26,091.

No. 6[redacted]242

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SEP 27 1917
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CLERK

IN THE

United States Supreme Court.

OCTOBER TERM, 1917.

NEW ORLEANS AND NORTHEASTERN RAILROAD COMPANY,

Petitioner,

versus

JOE SCARLET.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

NEW ORLEANS AND NORTHEASTERN RAILROAD COMPANY,
Petitioner.

J. BLANC MONROE,
MONTE M. LEMANN,
A. S. BOZEMAN,
Counsel for Petitioner.

L. E. JEFFRIES,
H. O'B. COOPER,
Of Counsel.

HAUSER PRINTING CO., "The Legal Printers," 720 Poydras St., N. O., La.

IN THE

United States Supreme Court.

OCTOBER TERM, 1917.

NEW ORLEANS AND NORTHEASTERN RAILROAD COMPANY,

Petitioner,

versus

JOE SCARLET.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

Now comes the New Orleans and Northeastern Railroad Company and the United States Fidelity and Guaranty Company, petitioners, by its counsel, and moves this Honorable Court that it shall, by *certiorari* or other proper process directed to the Honorable the Judges of the Supreme Court of the State of Mississippi, require said Court to certify to this Court, for its review and determination, a certain cause in said Supreme Court of Mississippi lately pend-

ing wherein the petitioner, New Orleans and Northeastern Railroad Company, was appellant and the said Joe Scarlet was appellee, and to that end it now tenders herewith its petition and brief, with a certified copy of the entire record in the said cause in the said Supreme Court of Mississippi.

J. BLANC MONROE,
MONTE M. LEMANN,
A. S. BOZEMAN,
Counsel for Petitioner.

L. E. JEFFRIES,
H. O'B. COOPER,
Of Counsel.

IN THE

United States Supreme Court.

OCTOBER TERM, 1917.

NEW ORLEANS AND NORTHEASTERN RAILROAD COMPANY,

Petitioner,

versus

JOE SCARLET.

To the Honorable The Supreme Court of the United States:

The petition of the New Orleans and Northeastern Railroad Company, plaintiff in error, and the United States Fidelity and Guaranty Company, surety on its appeal bond in the Supreme Court of Mississippi, respectfully shows to this Honorable Court that Joe Scarlet, the defendant in error, brought this suit against the New Orleans and Northeastern Railroad Company, plaintiff in error, in the Circuit Court of Clarke County, Mississippi, at the March term, 1916, thereof, under the act of Congress commonly called the "Federal Employers' Liability Act," 35 Statutes at Large, page 65, approved April 22, 1908, and the Acts of Congress amending the same, for personal injuries received by the defendant in error while employed by the said railroad company as a locomotive fireman in interstate commerce; that said cause was heard and determined by said Circuit Court at the said March term, 1916, and a judgment was

rendered therein in favor of the said Joe Scarlet for the sum of $2,500 and costs; that thereafter an appeal was prosecuted by the plaintiff in error to the Supreme Court of the State of Mississippi, being docketed and entitled therein as "No. 19,342, *New Orleans and Northeastern Railroad Company, Appellant, versus Joe Scarlet, Appellee.*"

That thereafter, on, to wit, the 4th day of June, 1917, the Supreme Court of Mississippi rendered a judgment in said case affirming the judgment of the court below for $2,500 and adding thereto the statutory damages of five per cent. on affirmance amounting to $125, with interest on the said principal sum amounting to $181, aggregating $2,806, together with all costs of court; the said judgment being rendered in favor of the said Joe Scarlet, appellee, and against petitioners, the New Orleans and Northeastern Railroad Company, appellant, and the said United States Fidelity and Guaranty Company, the surety on its appeal bond.

That thereafter, within the time prescribed by Rule 14 of the Rules of the Supreme Court of Mississippi, and in pursuance thereof, the said appellant railroad company filed its written suggestion of error of law in said case, and thereupon, on the 2nd day of July, 1917, the said Supreme Court of Mississippi overruled and denied the petitioner's suggestion of error in said case and made the judgment entered against petitioner in said court final; the said Supreme Court of Mississippi being the highest court of the State in which a decision in said suit could be had.

Your petitioners presented to the Chief Justice of the Supreme Court of Mississippi a petition for a writ of error with *supersedeas* to remove the record in said case to this Honorable Court for review, under Section 237 of the Judicial Code, as amended, and the said writ of error with *super-*

sedeas was allowed by the said Chief Justice of the Supreme Court of Mississippi on the 6th day of July, 1917, and the said writ of error, together with the petitioner's assignment of errors and the entire record and proceedings in said cause, have been certified to and filed and docketed in this Honorable Court, entitled *"New Orleans and Northeastern Railroad Company, Plaintiff in Error, versus Joe Scarlet, Defendant in Error"*; all of which will more fully appear from the record of said cause now on file in this Honorable Court, which is herewith shown the Court.

Nevertheless, it has been suggested to petitioners that the proper course to have said case reviewed by this Court is by writ of *certiorari*, and petitioners desiring to certainly secure a review of this case, and the time being limited by law within which a writ of *certiorari* may be applied for, and not waiving any of their rights under and by virtue of said writ of error, but still insisting upon their right to prosecute the same, and being advised that said judgment of the Supreme Court of Mississippi became and is final as of July 2, 1917, and that this Court should require the case to be certified to it for its review and determination under the said act of Congress permitting any cause wherein a final judgment has been rendered by the highest Court of a State in which a decision could be had to be certified for review and determination, file this their petition for a writ of *certiorari* concurrently with said writ of error, and show the following grounds therefor:

In the trial of said cause in said Circuit Court of Clarke County, the said trial court propounded and gave in charge to the jury a statute of Mississippi commonly called "the *prima facie* statute," being Section 1985 of the Mississippi Code of 1906, as amended by Chapter 215 of the Laws of Mississippi of 1912; which statute relates to the burden of

proof and provides that in all actions against railroad corporations and other corporations, companies, etc., using engines, locomotives or cars of any kind propelled by the dangerous agencies of steam, electricity, gas, gasoline or lever power, and running on tracks, for damages done to persons or property, proof of injury inflicted by the running of the engines, locomotives or cars of any such railroad corporation or company shall be *prima facie* evidence of the want of reasonable skill and care of such railroad corporation or company in reference to such injury; whereas, the petitioner insisted, both in said trial court and in said Supreme Court of Mississippi, and now insists, that in this case brought under the Federal Employers' Liability Act it was prejudicially erroneous to your petitioner, New Orleans and Northeastern Railroad Company, for said State statute to have been given in charge to the jury; and the said petitioner in said trial court and in said Supreme Court of Mississippi claimed the right, privilege or immunity under the Constitution of the United States and the said statute of the United States known as the Federal Employers' Liability Act to have the substantive law and the burden of proof in said case controlled exclusively by said Federal Employers' Liability Act and not by the *prima facie* statute of the State of Mississippi, and now insists that the said *prima facie* statute of the State of Mississippi as given in charge to the jury by said trial court is in conflict with the said Federal Employers' Liability Act, and that the decision of said Supreme Court of Mississippi in affirming the said judgment and in holding that the giving of said Mississippi statute in charge to the jury by the said trial court was not erroneous, was against the right, privilege or immunity especially set up and claimed by petitioner under such Constitution and statute.

And that the said judgment of the Supreme Court of Mississippi denied to petitioner, the New Orleans and Northeastern Railroad Company, its rights and privileges under the said Federal statute and under the Constitution of the United States, and particularly the Fourteenth Amendment thereof; all of which appears, it is respectfully submitted, in the record of the proceedings of the Supreme Court of Mississippi in said cause, which record is herewith submitted.

Wherefore, your petitioner respectfully prays that a writ of *certiorari* be issued under the seal of the Court, directed to the Supreme Court of Mississippi, sitting at Jackson, in said State, commanding the Court to certify and send to this Court on a day to be designated a full and complete transcript of the record and all proceedings of said Court had in said cause, to the end that this cause may be reviewed and determined by this Honorable Court, as provided by Section 237 of the Judicial Code, as amended, and that the said judgment of the Supreme Court of Mississippi may be reversed by this Honorable Court; and for such further relief as may seem proper, and your petitioners will ever pray.

NEW ORLEANS AND NORTHEASTERN
RAILROAD COMPANY,
UNITED STATES FIDELITY AND
GUARANTY COMPANY,
By J. BLANC MONROE,
MONTE M. LEMANN,
A. S. BOZEMAN,
Counsel.

L. E. JEFFRIES,
H. O'B. COOPER,
Of Counsel.

STATE OF MISSISSIPPI,
LAUDERDALE COUNTY.

Personally appeared before me, the undersigned Notary Public in and for the City of Meridian, in said County and State, the within named A. S. Bozeman, who being duly sworn says that he is counsel for the petitioners, New Orleans and Northeastern Railroad Company and United States Fidelity and Guaranty Company, and that he knows of the above proceedings had, and that the facts stated in the foregoing petition are true to the best of his knowledge and belief.

A. S. BOZEMAN.

Sworn to and subscribed before me this 11th day of September, 1917.

(Seal)

A. C. HULETT,
Notary Public.

IN THE

United States Supreme Court.

OCTOBER TERM, 1917.

NEW ORLEANS AND NORTHEASTERN RAILROAD COMPANY,

Petitioner,

versus

JOE SCARLET.

To Joe Scarlet, Defendant in Error, or Thomas G. Fewell and C. B. Cameron, His Attorneys of Record:

This is to notify you that the plaintiff in error will, on Monday, the 1st day of October, 1917, present to the Supreme Court of the United States, in its courtroom, at Washington, D. C., its motion for a writ of *certiorari* upon its verified petition and a copy of the entire record in this

case (a copy of said motion and of said petition are delivered to you herewith).

This 11th day of September, 1917.

NEW ORLEANS AND NORTHEASTERN RAILROAD COMPANY,

UNITED STATES FIDELITY AND GUARANTY COMPANY,

By J. BLANC MONROE,
MONTE M. LEMANN,
A. S. BOZEMAN,
Counsel.

L. E. JEFFRIES,
H. O'B. COOPER,
Of Counsel.

The foregoing notice and delivery of a copy thereof and of the motion and petition for writ of *certiorari* are hereby acknowledged this 11th day of September, 1917.

THOS. G. FEWELL,
C. B. CAMERON,
Attorneys for Defendant in Error.

Office Supreme Court, U. S.
FILED
SEP 27 1917
JAMES D. MAHER
CLERK

No. ~~624~~ 243

United States Supreme Court.

No. ——.

NEW ORLEANS AND NORTHEASTERN RAILROAD COMPANY, PETITIONER,

versus

JOE SCARLET.

Petition for a Writ of Certiorari to the Supreme Court of the State of Mississippi.

BRIEF IN SUPPORT OF APPLICATION FOR WRIT OF CERTIORARI.

J. BLANC MONROE,
MONTE M. LEMANN,
ALBERT S. BOZEMAN,
Attorneys for New Orleans and Northeastern Railroad Company, Petitioner.

L. E. JEFFRIES,
H. O'B. COOPER,
Of Counsel.

HAUSER PRINTING CO. "The Legal Printers," 720 Poydras St., N. O., La

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United States Supreme Court.

No. ——.

NEW ORLEANS AND NORTHEASTERN RAILROAD COMPANY, PETITIONER,

versus

JOE SCARLET.

Petition for a Writ of Certiorari to the Supreme Court of the State of Mississippi.

BRIEF IN SUPPORT OF APPLICATION FOR WRIT OF CERTIORARI.

SYLLABUS.

The Mississippi *Prima Facie* Statute may not properly be applied in a suit under the Federal Employers' Liability Act.

The Mississippi *Prima Facie* Statute, as construed and applied by the Supreme Court of Mississippi, is in effect not merely a rule of evidence, but substantially impairs and lessens the rights of the defendant.

As construed by the Supreme Court of Mississippi, the *Prima Facie* Statute of that State imposes liability upon the defendant without any allegation or proof of negligence.

Under the decisions in *Norfolk Southern Railway Co. vs. Ferebee*, 238 U. S. 269, and *Central of Vermont Ry. Co. vs. White*, 238 U. S. 507, a substantive right or defense under the Federal law cannot be lessened or destroyed by a State rule of practice.

To apply the Mississippi *Prima Facie* Statute to suits under the Federal Employers' Liability Act would make a defendant liable under that act, irrespective of proof of negligence in fact. The act does not contemplate any such result, but, on the contrary, expressly negatives it.

Southern Railway Co. vs. Gray, 241 U. S. 333.

The required uniformity in the application of the Federal act cannot be had if varying rules of liability under State statutes are to be applied.

See *Adams Express Co. vs. Croninger*, 226 U. S. 491; *Second Employer's Liability Cases*, 223 U. S. 1; *Chicago & Rock Island R. R. vs. Devine*, 239 U. S. 52.

It was not the intention of Congress that a suit should be maintainable in Mississippi under the Federal Employers' Liability Act upon a state of facts upon which it could not be maintained in any or every other State; else the rights of the parties would be dependent not upon the Federal law, but upon the law of the State where suit is brought.

STATEMENT OF THE ISSUES.

If the Court Please:

This case is brought here for determination of the question whether the so-called Mississippi *Prima Facie* Statute may be properly applied in suits brought under the Federal Employers' Liability Act.

The Mississippi Statute (Chapter 215, Mississippi Laws of 1912, p. 290) reads:

> "In all actions against railroad corporations and all other corporations, companies, partnerships, and individuals using engines, locomotives or cars of any kind or description whatsoever, propelled by the dangerous agencies of steam, electricity, gas, gasoline, or lever power and running on tracks, for damages done to persons or property, proof of injury inflicted by the running of the engines, locomotives or cars of any such railroad corporation or such other corporation, company, partnership, or individual, shall be *prima facie* evidence of the want of reasonable skill and care of such railroad corporation, or such other corporation, company, partnership or individual, in reference to such injury. This section shall also apply to passengers and employees of railroad corporations and of such other corporations, companies, partnerships and individuals."

Under this statute, as construed and applied by the Supreme Court of Mississippi in the cases hereinafter quoted at length, a plaintiff may recover against a railroad company upon a declaration merely charging that the plaintiff was injured by defendant's running train, without charging negligence, and therefore, of course, without proving negligence. In other words, a recovery may be had in Mississippi under this statute against a railroad company, irrespective of allegation or proof of negligence.

See *Hudson vs. Railroad Company*, 95 Mississippi, 41; and *Mobley vs. New Orleans & Northeastern Railroad*, 100 Mississippi, 451.

The present suit was brought under the Federal Act, in the Circuit Court of Clarke County, Mississippi, by Joe Scarlet, a locomotive fireman, against the New Orleans and Northeastern Railroad Company, by whom he was employed, to recover damages for personal injuries sustained by him while engaged in interstate commerce.

At the trial, the plaintiff asked the Court to instruct the jury that the Mississippi *Prima Facie* Statute was applicable, and accordingly, that in the absence of any affirmative proof of negligence, the jury might find the defendant liable.

The defendant asked the Court to instruct the jury specifically that the Mississippi statute was not applicable to this proceeding brought under the Federal law. The Court granted the plaintiff's request and denied the defendant's.

The Court accordingly instructed the jury as follows:

> "That the *Prima Facie* Statute of Mississippi is a rule of evidence and is admissible and binding, even though the plaintiff's right of action is circumscribed

and controlled by the act of Congress known as the Employers' Liability Act, and that proof of injury from the running of defendant's engine and cars is *prima facie* evidence of negligence on the part of the defendant, and in order to meet the same the defendant must show facts and circumstances surrounding the occurrence and thus show to the jury that there was no negligence on its part, and that this presumption is not met by conjecture and surmise."

The instructions which the defendant requested and which the Court refused to give were as follows:

"That this case is governed by the Federal Employers' Liability Act, and that, under the testimony and the law of the case, as contained in said act of Congress, the defendant is not liable to the plaintiff, and you should return a verdict for the defendant.

"The Court instructs the jury that this being a suit under the Federal Employers' Liability Act, the plaintiff is not entitled to the benefit of the Mississippi *Prima Facie* Statute, and that the mere fact that the injury was caused by a running train is not *prima facie* evidence of negligence on the part of the railroad company in this case."

The case went to the jury upon these instructions and the jury found a verdict for the plaintiff in the sum of twenty-five hundred dollars. The defendant prosecuted an appeal to the Supreme Court of Mississippi, where the judgment was affirmed, that Court squarely holding that the Mississippi *Prima Facie* Statute was properly applied and charged to the jury.

A writ of error to this, the Supreme Court of the United States, was allowed from the decision by the Chief

Justice of the Supreme Court of Mississippi, and the record upon this writ of error has been duly filed in this Court. It has been suggested, however, that under the amendment to Section 237 of the Judicial Code established by the Act of September 6, 1916 (39 Stat. at L., c. 448), the case is properly to be brought to this Court by application for certiorari; and, in view of the fact that the Act of September 6, 1916, has not yet received any authoritative construction by this Court and in order to guard against any possibility of losing, through any technical error in procedure, the right to a review in this court, the defendant railroad company, the present petitioner, has simultaneously (and without prejudice to, or waiver of its writ of error, but, on the contrary, insisting thereon), presented the application for *certiorari* in support of which this brief is filed.

II.

The Federal Employers' Liability Act (Act of April 22, 1908; 35 Stat. at L. c. 149, Sec. 1; U. S. Compiled Statutes, 1916, Annotated, Sec. 8657), provides that every common carrier engaged in interstate commerce shall be responsible to employees for

> "Injury or death resulting in whole or in part from the *negligence of* any of the officers, agents or employees of such carrier, or by reason of any defect or inconsistencies due to its *negligence* in its cars, engines, appliances, machinery, track, roadbed, work boat, wharves or other equipment." (Italics ours.)

As the words italicized by us indicate, the act provides that the common carrier shall be responsible only for negligence.

This Court has expressly so declared. See *Southern Railroad Company vs. Gray*, 241 U. S. 333, where this Court said, in a case arising under the act:

> "Negligence by the railroad company is essential to a recovery; and there is not a scintilla of evidence to show this under the most favorable view of the testimony urged by counsel for defendant in error."

The application, however, to cases brought under the Federal act, of the Mississippi *Prima Facie* Statute, permits the plaintiff to recover without proof of negligence, upon the mere showing of injury received.

We submit to the Court that this result was not only not contemplated by Congress but is directly opposed to the intention of Congress as indicated by the language of the act.

We further submit to the Court that to permit the application of a State statute of this sort in a proceeding under a Federal act, will defeat uniformity in the application of the Federal act, and will result in permitting recovery by a plaintiff in one State when, upon precisely the same state of facts, recovery could not be had in another State.

The substantial result and effect of Federal law will thus be determined not by the Federal Congress and the Federal Courts, but by the laws and the Courts of the various States.

This Court has heretofore held broadly, in a related class of cases, that in adopting the Carmack Amendment, Congress showed its intention to regulate entirely the liability of a carrier for loss or damage to property carried,

and that this legislation *"supersedes all regulations and policies of a particular State upon the same subject."*

See *Adams Express Co. vs. Croninger*, 226 U. S. 491, and the many subsequent cases applying its doctrine.

If the Carmack Amendment supersedes all regulations and policies of the States including all judicial decisions, on the subject of the liability of carriers for property damage, then certainly the Federal Employers' Liability Act supersedes all regulations and policies of particular States on the subject of personal injuries to employees of carriers in interstate commerce; and this Court has so held repeatedly. See *Second Employers' Liability Cases*, 223 U. S. 1; *Chicago & Rock Island R. R. vs. Devine*, 239 U. S. 52, where it was held that:

> "Previous decisions of this Court have conclusively established the exclusive operation of the Employers' Liability Act over the subject with which it deals, to the exclusion of all State statutes relating thereto."

We are not left, however, merely to analogies or general statements, closely though they fit this case. In two practically indistinguishable cases arising under the very act in question, this Court has held that State statutes similar to the Mississippi *Prima Facie* Statute could not be applied; and the same result has been independently reached by the Supreme Court of Georgia and the Supreme Court of Florida, who had before them the application of statutes practically identical with the Mississippi statute here involved.

The first of the cases referred to is that of *Norfolk Southern R. R. vs. Ferebee*, 238 U. S. 269 (April 23, 1915). In that case the question at issue was the application in a suit brought under the Federal Employers' Liability Act of a statute of North Carolina regulating practice upon new trials. It was contended in that case, as in this case, that the State statute related purely to remedy and to procedure, and that, therefore, it was applicable to suits under Federal act. This Court, however, denied this contention, laying down the broad rule in this general statement:

> "A substantive right or defense arising under the Federal law cannot be lessened or destroyed by a *State rule of practice.*" (Italics ours.)

This general statement is in itself sufficient to dispose of the present case; but the Court has also directly applied this statement to a case substantially on all-fours with the present case.

> See *Central Vermont Ry. Co. vs. White*, 238 U. S. 507, decided June 21, 1915.

In that case suit was brought in a State court in Vermont under the Federal Employers' Liability Act by the administrator of one White, a former employee of the company, for the benefit of his widow and children against the railroad company for his death occurring in its service. White was killed in a rear-end collision, and it was determined that the defendant railway company was guilty of negligence, proximately causing the death. It was contended, however, by the railroad company that White, the decedent, was himself guilty of contributory negligence and that the recovery should be diminished under the Employers' Liabil-

ity Act because thereof; and the question arose, and was a determinative one, upon which party rested the burden of proof touching contributory negligence.

Under the laws of Vermont, as determined by its Supreme Court for years in a long series of decisions, the burden in cases of this kind rested on the plaintiff, not only to show that the defendant had been guilty of negligence, but, as well, that he (the plaintiff) was not guilty of contributory negligence. The trial court refused to hold that the Vermont rule, considered as a rule of evidence, was applicable to the case, but did hold that the Employers' Liability Act was to be administered according to the general rule on the subject of the burden of proof established by the Federal Courts, placing the burden of proof on the defendant to show that the plaintiff was guilty of contributory negligence. This ruling was approved by the Supreme Court of Vermont, 87 Vt. 330, and the case was appealed by the railroad company to the Supreme Court of the United States. This Court, Mr. Justice Lamar delivering the unanimous opinion of the Judges, said:

> "In this court, the argument was devoted principally to a discussion of this ruling—counsel for the railroad company earnestly insisting that the *lex fori* must determine all questions of evidence, including that of the burden of proof. (Wharton on Conflict of Laws, 3rd Ed., Sec. 478b.) It was argued that there is nothing in the Federal statute indicating an intent to change the State rule as to the burden of proof, and it is claimed that because of the Court's mistaken construction of the Federal act the railway company has been deprived of a right to which it was entitled under the laws of Vermont.
>
> "There can, of course, be no doubt of the general principle that matters respecting the remedy—

such as the form of the action, sufficiency of the pleadings, rules of evidence, and the statute of limitations—depend upon the law of the place where the suit is brought. (*M'Niel vs. Holbrook*, 12 Pet. 89.) But matters of substance and procedure must not be confounded because they happen to have the same name. For example, the time within which a suit is to be brought is treated as pertaining to the remedy. But this is not so if, by the statute giving the cause of action, the lapse of time not only bars the remedy but destroys the liability. (*Phillips vs. Grand Trunk Ry.*, 236 U. S. 662; *Boyd vs. Clark*, 8 Fed. Rep. 849; *Hollowell vs. Horwick*, 14 Mass. 188; *Cooper vs. Lyons*, 77 Tenn. 597 (2); *Newcombe vs. Steamboat Co.*, 3 Iowa (G. Greene) 295.) In that class of cases the law of the jurisdiction, creating the cause of action and fixing the time within which it must be asserted, would control even where the suit was brought in the courts of a State which gave a longer period within which to sue. So, too, as to burden of proof. As long as the question involves a mere matter of procedure as to the time when and the order in which evidence should be submitted the State courts can, in those instances, follow their own practice even in the trial of suits arising under the Federal law.

"But it is misnomer to say that the question as to the burden of proof as to contributory negligence is a mere matter of State procedure. For, in Vermont, and in a few other States, proof of plaintiff's freedom from fault is a part of the very substance of his case. He must not only satisfy the jury (1) that he was injured by the negligence of the defendant, but he must go further and, as a condition of his right to recover, must also show (2) that he was not guilty of contributory negligence. In those States the plaintiff is as much under the necessity of proving one of these facts as the other; and as to neither can it be said that the burden is imposed by a rule

of procedure, since it arises out of the general obligation imposed upon every plaintiff, to establish all of the facts necessary to make out his cause of action. But the United States courts have uniformly held that, as a matter of general law, the burden of proving contributory negligence is on the defendant. The Federal courts have enforced that principle, even in trials in States which hold that the burden is on the plaintiff. (*Railroad vs. Gladmon*, 15 Wall. 401; (1), 407-408; *Hough vs. Railway Co.*, 100 U. S. 225; *Inland, etc., Co. vs. Tolson*, 139 U. S. 551, (4); 557; *Washington, etc., R. R. vs. Harmon*, 147 U. S. 571; *Hemingway vs. Ill. Central R. R.*, 114 Fed. Rep. 843.) Congress in passing the Federal Empoyers' Liability Act, evidently intended that the Federal statute should be construed in the light of these and other decisions of the Federal courts. Such construction of the statute was, in effect, approved in *Seaboard Air Line vs. Moore*, 228 U. S. 433. There was, therefore, no error in failing to enforce what the defendant calls the Vermont rule of procedure as to the burden of proof."

The only difference between the *White case* and the case at bar is this: In the *White case* the rule of evidence, presumably deducible from the common law, was one established by the decisions of the Supreme Court of Vermont. In the present case the State rule of evidence is a statutory one. This difference is immaterial. The Federal Employers' Liability Act, looking to its uniform administration throughout the nation, displaced State statutory enactments out of harmony with its purposes quite as much as it displaced the laws of the State as determined by its highest judicial tribunals.

The language of this Court in the *White case* is specially applicable. It is therein said that "it is a misnomer to

say that the question as to the burden of proof as to contributory negligence is a mere matter of State procedure." If the burden of proof as to contributory negligence is not a mere matter of State procedure, the question of the burden of proof, and the question of statutory presumption from designated proof, cannot be said to be a matter of State procedure. Those are matters of substance, and, as said by the Court in the case cited, "matters of substance and procedure must not be confounded because they happen to have the same name."

In that case this Court dealt with a so-called rule of evidence. In the case at bar, we are dealing with a so-called rule of evidence. In both cases the rule is a matter of substance. In truth, we do not know any statute which is in fact more a matter of substance in railroad litigation than the Mississippi *Prima Facie* Statute.

See, also, *Michigan Central R. R. vs. Vreeland*, 227 U. S. 59; *American R. R. of Porto Rico vs. Didricksen*, 227 U. S. 145; *Gulf, Colo., etc., R. R. vs. McGinnis*, 228 U. S. 173; *Garrett vs. L. & N. R. R.*, 235 U. S. 308; *Seaboard Air Line vs. Horton*, 233 U. S. 492; *Southern Ry. vs. Prescott*, 240 U. S. 632.

In the case last cited, this Court held that:

> "Under a stipulation in a bill of lading of an interstate shipment that the carrier shall be liable as warehouseman only, for goods after arrival at destination and not removed within a specified time, the carrier is liable only for negligence, and if the loss admittedly occurred by fire, *the burden is on the plaintiff to prove negligence, notwithstanding the rule may be different under State law.*" (Italics ours.)

The rule thus recognized by this Court has been independently recognized and applied by two State courts, the Supreme Court of Georgia and the Supreme Court of Florida, in cases identical with the present.

See *L. & N. R. R. Co. vs. Kemp*, 140 Georgia, 657 (79 Southeastern Reporter, 558); and *L & N. R. R. Co. vs. Rhoda*, 74 Southern Reporter, 19 (decided January 18, 1917).

In the Georgia case, in a suit under the Federal Employers' Liability Act, the lower Court charged the jury that it might apply a State statute substantially corresponding to the Mississippi *Prima Facie* Statute. Upon appeal this was held error, the Supreme Court of Georgia saying:

> "The plaintiff has based his right of action upon the provisions of the Federal act referred to above; and the rights of the p laintiff and the liability of the defendant are to be determined by that act, and under the construction of its terms. So far as the subject-matter of this suit is concerned, the act of Congress supersedes the legislation of the State which would have covered the subject in the absence of Federal legislation; and, while the case was tried in the State court, it is to be tried under the provisions of the Federal statute. That being true, apart from any consideration as to the correctness of the charge in itself, the Court should not have charged the provisions of the State statute which raised a presumption in certain cases against a railroad company upon proof of injury by the running of its locomotives or cars."

In the Florida case, 74 Southern Reporter, 19 (decided January 18, 1917), the case was before the Supreme Court

of Florida for the second time, the Court's decision on the first appeal having been reversed by this Court in a *per curiam* opinion, because of the erroneous application of the State statute to the Federal law.

See *L. & N. R. R. vs. Rhoda*, 238 U. S. 608.

The case was, thereafter, again tried in the lower courts of Florida and again taken up to the Supreme Court of that State, where the attempt was made again to apply a *prima facie* statute in Florida corresponding to the Mississippi *Prima Facie* Statute .

The Supreme Court of Florida recognized that this point had in effect been disposed of by the prior decision of this Court in that particular case, as well as by the other related decisions of this Court. The charges given by the trial Judge in that case, which were excepted to by the defendant, were these:

> "It devolves upon the plaintiff to prove by a preponderance of the evidence that the deceased, Clarence Rhoda, was killed by the locomotive of the Louisville and Nashville Railroad Company. Then it would devolve upon the Louisville and Nashville Railroad Company to prove by a preponderance of the evidence that it was not negligent in its acts.
>
> "Where the plaintiff shows by his evidence that he has sustained damage and injury by the running of an engine of a railroad company, he is entitled to recover therefor, unless the company makes it appear, or it does not appear by a preponderance of the evidence, either that he assumed the risk, or that the injury was not due to the negligence of the agents of the company in charge of such engine.
>
> "If you find, after a consideration of the whole of the evidence, that the plaintiff's intestate, Clar-

ence Rhoda, was killed by an engine of the defendant on its tracks, and you do not find from a preponderance of the evidence that he assumed the risk of injury, but the evidence is equally balanced in your minds between negligence and freedom from negligence on the part of the defendant's servants on said engine your verdict must be for the plaintiff."

(NOTE. The Court will note that this instruction is substantially the same as Instruction No. 1 given by the Court for the plaintiff in the case at bar.)

The Supreme Court of Florida said:

"The questions necessary to be determined are whether the State statute quoted below *conflicts with the Federal act;* and, if it does not conflict, then whether the defendant has sustained the burden placed upon it by the State statute. If there is substantial conflict, the Federal act is paramount, and *whether the defendant successfully carried the statutory burden imposed by the local law is quite immaterial.*"

"The State statute as originally enacted in 1891, is entitled:

" 'An Act Defining the Liabilities of Railroad Companies in Certain Cases.'

"As re-enacted and brought forward in the General Statutes of 1916, the pertinent sections of the law are as follows:

" 'A railroad company shall be liable for any damage done to persons, stock or other property, by the running of the locomotives or cars or other machinery of such company, or for damage done by any person in the employ and service of such company, unless the company shall make it appear that their agents have exercised all ordinary and reasonable care and diligence, the presumption in all cases being against the company.

" 'If any person is injured by a railroad company by the running of the locomotives or cars or other machinery of such company, he being at the time of such injury an employee of the company, and the damage was caused by the negligence of another employee, and without fault or negligence on the part of the person injured, his employment by the company shall be no bar to recovery. No contract which restricts such liability shall be legal or binding. (Sections 3148, 3150, Gen. Stats., 1906; Comp. Laws, 1914.)

"The Federal act was intended to be paramount and uniform in its operation upon the matters within its purview. This supremacy and uniformity can be obtained only by excluding all local laws affecting the substantial rights of the parties that conflict with the Federal act. The State law is intended to enforce a local State policy substantially different from that disclosed by the terms of the Federal act. The State law is long prior in date and cannot be regarded as an aid to the Federal act, but is apparently in positive and material conflict therewith. The local statute was not intended to cover subjects that are controlled by paramount Federal regulations.

"A Federal statute upon a subject exclusively under Federal control must be construed by itself and cannot be pieced out by State legislation. If a liability does not exist under the Employer's Liability Act of 1908, it does not exist by virtue of any State legislation on the same subject. (*Michigan Central R. R. vs. Vreeland*, 227 U. S. 59; 33 Supreme Court, 192; 57 L. Ed. 417; Ann. Cases 1941C, 176.)

* * *

"Both the Federal acts and the State statutes above quoted define the liability of a railroad company in the cases of negligence covered by the enactments; and in so far as the State law in effect creates a liability by virtue of a presumption of negligence from 'damage done' unless the company shall

make it appear that their agents have exercised all ordinary and reasonable care and diligence, the presumption in all cases being against the company, the local statute *conflicts with the Federal act in matters of substance*, affecting liability. *The Federal act contains no provision creating a rebuttable presumption of negligence* that substantially affects the liability of defendant in this class of cases. It is *not a question* of whether the statutory presumption denies *due process* or equal protection of the laws as in *Mobile*, J. & K. C. R. Co. vs. Turnipseed, 219 U. S. 35; 31 Sup. Ct. 136; 55 L. Ed. 78; 32 L. R. A. (N. S.) 226; Ann. Cases 1912A, 463; but whether there is a material conflict between the local statute and the paramount Federal act affecting the liability imposed by the Federal act. See *Central Vt. Ry. vs. White*, 238 U. S. 507; 35 Sup. Ct. 865; 59 L. Ed. 1433; Ann. Cases 1916B, 252. The State statute is not so similar to the Federal act as to make it immaterial which law is applied. *Kansas City Western Ry. Co. vs. McAdow*, 240 U. S. 51; 36 Sup. Ct. 51; 60 L. Ed. 520. Nor is the difference in the acts a mere rule of evidence or a matter of procedure not affecting the substance of the liability. See *Central Vt. Ry. vs. White*, 238 U. S. 507; 35 Sup. Ct. 865; 59 L. Ed. 1433; Ann. Cases 1916B, 252. The provision in the quoted State statute that is not contained in the Federal act does not relate to the jurisdiction of the State court, *but relates to matters of substance affecting the liability of the defendant*, in that under the State statute *negligence and consequent liability is presumed from proof of an injury*, unless overcome by the defendant, whereas under the Federal act, considered in the light of prior Federal decisions, negligence of the defendant must appear from the evidence. *Patton vs. T. & P. Ry. Co.*, 179 U. S. 658; 21 Sup. Ct. 275; 45 L. Ed. 361; *Louisville & Nashville R. R. vs. Kemp*, 140 Ga. 657; 79 S. E. 558; *Central Vt. Ry. vs. White, supra.*" (Italics ours.)

In its opinion, in the present case, insisting upon the application of the Mississippi *Prima Facie* Statute, the Supreme Court of Mississippi rests its decision upon the proposition that the Mississippi statute has been declared to be a rule of evidence purely, citing *Lumber Co. vs. Pierce,* 235 U. S. 380. In that case this Court held that the Mississippi statute was not unconstitutional under the Fourteenth Amendment as taking property without due process. It does not by any means follow from that decision that the Mississippi statute is properly to be applied in suits under the Federal Employers' Liability Act. As the Supreme Court of Florida said in the case last quoted from, "it is not a question of whether the statutory presumption denies due process or equal protection of the laws." It is a question as to whether the Mississippi statute so affects the rights of the parties as to substantially affect the rights or defenses accruing under the Federal law. If it does, then even if the State rule would ordinarily be considered a rule of practice, or be so considered for the purpose of determining constitutionality under the Fourteenth Amendment, the State rule cannot be applied, in a suit upon the Federal law, under the rule stated in *Norfolk Southern Railway Company vs. Ferebee,* 238 U. S. 269, where the Court broadly declared that "a substantive right or defense under a Federal law cannot be lessened or destroyed by a State *rule of practice.*" (Italics ours.)

Thus, even if the Mississippi statute could be ordinarily classed as a State rule of practice, it would not be properly applicable. As a matter of fact, the Mississippi statute being substantially a statute governing the burden of proof is not a mere rule of practice or matter of procedure, but

goes to the substantive rights of the parties. See Thayer's Preliminary Treatise on Evidence, pages 313 to 352 and 352 to 389, especially pages 388 and 389. And consideration of the Mississippi statute as it has been construed and applied by the Supreme Court of the State, emphasizes its importance as a substantive rule of law. In the cases of *Hudson vs. R. R. Co.*, 95 Miss. 41, and *Mobley vs. N. O. & N. E. R. R.*, 100 Miss. 451, it was held by the Supreme Court of the State of Mississippi that a declaration in the words of the statute merely—to wit: That plaintiff was injured by a running train of defendant, without any further charge of negligence—states a good cause of action and is not subject to demurrer. Certainly, before the enactment of the Mississippi *Prima Facie* Statute, and certainly in jurisdictions where such a statute does not exist, such a declaration would not state a good cause of action, but it would be necessary to allege further that the plaintiff's injury was caused by some specific negligence on the part of the defendant. The statute in effect therefore, created a new statutory right of action—to wit, the right of action for injury inflicted by running engines or cars of the defendant—which may be established in court without any evidence or proof of negligence, on the part of the defendant.

Would such a declaration as was held sufficient by the Supreme Court of Mississippi in the case above cited be held sufficient under the Federal Employers' Liability Act? If so, then the provision in that act making the common carrier liable for negligence is meaningless because the carrier is liable irrespective of allegations—and so, necessarily, irrespective of proof—of negligence.

In the *Thornhill case*, 106 Miss. 411, 63 Southern Reporter, 679, the Supreme Court said:

> "Prior to the enactment of this statute, if a jury was unable to find the facts and circumstances of an injury, no inference of negligence relative thereto could be drawn, and the verdict must have been for the defendant. Under the rule then in force, the Court could have very properly reinstructed the jury as requested by appellant, that 'if they are unable on their oaths to find from the evidence that the plaintiff was guilty of negligence causing the said injuries, they will find for the defendant.' The statute, however, reverses this rule, and now, when injury is shown, the facts and circumstances must be established; otherwise the verdict must be for the plaintiff."

In the case of *Railroad Co. vs. Hicks*, 91 Miss. 273, 46 So. 360, the Court held that the statute should be interpreted precisely as if it had been written thus: "Proof of injury inflicted by the running of locomotives or cars of such company shall be *prima facie* evidence of liability on the part of the company."

In view of the construction which has thus been placed upon this statute, it is clear that this statute creates a new and substantive right, and *is* more than a mere local rule of procedure or practice.

Even if it were no more it would still be inapplicable under the decisions of this Court above referred to, especially *Norfolk Southern Railway Co. vs. Ferebee*, 238 U. S. 269.

The present is but one of several cases recently decided by the Supreme Court of Mississippi in which the Missis-

sippi *Prima Facie* Statute has been held applicable to suits under the Federal Employer's Liability Act, and in which writs of error or applications for *certiorari* have been, or are about to be presented, to this Court.

The point involved is therefore one of great and constantly recurring importance. As we have shown, the Supreme Court of Florida and the Supreme Court of Georgia have both held *prima facie* statutes inapplicable. If the Supreme Court of Mississippi correctly holds its *prima facie* statute applicable, then we have the diversity and discordant result in the application of the same Federal law which this Court has recently, in so many cases arising under various Federal acts, declined to permit. If the decision of the Supreme Court of Mississippi rather than that of the Supreme Court of Georgia or Florida is correct, then an employee of a common carrier residing in Mississippi (where a *prima facie* statute exists) may recover upon a state of facts which would not permit an employee residing in Louisiana (where a *prima facie* statute does not exist), to recover. In other words, where suit is brought in Mississippi, recovery might be had under the Federal statute because of the local Mississippi law, whereas, if the same accident is made the basis of a suit in Louisiana, the plaintiff could not recover under the Federal law upon precisely the same state of facts, because of the difference between the law of Louisiana and the law of Mississippi.

If this result is to obtain, then all uniformity in the application of the Federal law vanishes; and the rights of the employees of carriers engaged in interstate commerce will depend not upon the Federal law, but rather upon the law of the State where suit is brought.

We respectfully submit that such a conclusion is inconsistent not only with the intention of Congress and with the repeated related decisions of this Court, but with the particular decisions in *Norfolk Southern Ry. vs. Ferebee*, 238 U. S. 269, and *Central Vermont Ry. vs. White*, 238 U. S. 507.

We respectfully submit that such a result would be most unfortunate in practice and would amount to taking the whole subject of liability of interstate carriers from one uniform, national regulation and submitting it to the varying rules of the various States.

We, therefore, respectfully submit that the application for *certiorari* should be granted and that after due proceedings the Mississippi *Prima Facie* Statute should be held inapplicable to proceedings under the Federal Employer's Liability Act and the judgment of the Supreme Court of Mississippi to the contrary should be reversed.

Respectfully submitted,

J. BLANC MONROE,
ALBERT S. BOZEMAN,
MONTE M. LEMANN,
Attorneys for New Orleans and Northeastern Railroad Company, Petitioner.

L. E. JEFFRIES,
H. O'B. COOPER,
Of Counsel.

FILED
MAR 18 1919
JAMES D. MAHER

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1918.

No. 242.

THE NEW ORLEANS AND NORTHEASTERN RAILROAD COMPANY AND THE U. S. FIDELITY AND GUARANTY COMPANY, PLAINTIFFS IN ERROR, PETITIONERS FOR CERTIORARI,

vs.

JOE SCARLETT, DEFENDANT IN ERROR.

In error and in certiorari, To the Supreme Court of the State of Mississippi:

Supplemental Brief for Plaintiffs in Error and Petitioners for Certiorari.

J. BLANC MONROE,
MONTE M. LEMANN,
ALBERT S. BOZEMAN,
Attorneys for New Orleans and Northeastern Railroad Company.

L. E. JEFFRIES,
S. R. PRINCE,
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In error and in certiorari, To the Supreme Court of the State of Mississippi:

Supplemental Brief for Plaintiffs in Error and Petitioners for Certiorari.

SYLLABUS:

No. 1. Under the Safety Appliance Act automatic couplers are not required between the locomotive and tender.

231 *U. S.* 675, *Pennell vs. Philadelphia and Reading Railroad.*

No. 2. When defendant Railroad Company has affirmatively proven that a coupler is free from defect, it is

prejudicial error for the Trial Court to charge the jury that unless the defendant shows how the accident happened and proves its own freedom from negligence, it must be presumed to have been negligent. 247 *U. S.* Harris Case; 231 *U. S.* 675; 179 *U. S.* 658.

No. 3. Negligence is an affirmative fact to be proven by the plaintiff.

IF THE COURT PLEASE:

Since our original briefs in this matter were prepared, we have had called to our attention the brief of the defendant in error, in which on page 4, this passage occurs:

> "The case of New Orleans and Northeastern Railroad Company vs. Cheney Harris, Admx., No. 276, October Term 1917, decided by this court June 3, 1918, is conclusive as to the applicability of our prima facie statute to actions arising under the Federal Employer's Liability Act, where the right of action is based upon negligence, but I respectfully submit to the court that the case at Bar is not covered or controlled by the Harris case.
>
> "The Harris case depended upon negligence — — and proof of negligence — — of the Railroad Company.
>
> "The case at bar depends upon condition of the Safety Appliances — — — negligence not being essential."

This amounts to an admission that the charge of which we complain was erroneously given and a contention that the error thus committed by the Trial Judge was not prejudicial to the Railroad and was not advantageous to Scarlett.

Before arguing the point, we wish to point out that plaintiff evidently has changed his views as to the value of the charge in controversy, since the case was heard below. In the Court below, his counsel especially formulated the charge and especially requested the Trial Judge to grant it. In the Supreme Court of Mississippi, he vigorously defended it; so vigorously, in fact, that the Supreme Court of Mississippi held, over our objection, that it was correctly given. If the charge was not to his advantage, he certainly went to a great deal of trouble to no purpose. It is only in this court, after the decision of this court in the Cheney Harris case, that the charge in question is relegated to the class of non-essentials.

Let us now consider whether or not the charge was advantageous to the plaintiff and prejudicial to the defendant. The charge granted is on page 110 of the record and reads — —

> "The court instructs the jury for the plaintiff in this case that what is known as the prima facie statute of Mississippi is a rule of evidence and is admissable and binding, even though the plaintiff's right of action is circum-scribed and controlled by the Act of Congress known as the Employer's Liability Act, and that proof of injury from the running of defendants engine and cars is prima facie evidence of negligence on the part of the defendant and in order to meet the same, the defendant must show the facts and circumstances concerning the occurence, and thus show to the jury that there was no negligence on its part and that this presumption is not met by conjecture and surmise."

The charge which was requested by the defendant and refused, reads — —

> "Record-page 113. The court instructs the jury for the defendant that this being a suit under the Federal Employer's Liability Act, the plaintiff is not entitled to the benefit of the Mississippi Prima Facie Statute and that the mere fact that the injury was caused to a running train is not prima facie evidence of negligence on the part of the Railroad Company in this case."

The charge given, plainly says to the jury, that the Railroad must show affirmatively how the accident happened and prove itself to be free from negligence. That is to say, it tells the jury that if the Railroad shows affirmatively that its couplers were not defective and stops there, the jury has a right to presume that the Railroad was negligent and to assess damages against it. Surely such instructions were not only incorrect, but were in a marked degree prejudicial. We contend that in this case the defendant Railroad proved affirmatively that the couplers were not defective, but were strictly according to the standard and in good order, and that, having made that proof, they were entitled to have the jury told that if there was no defect in the couplers, the burden was on the plaintiff to explain how the accident happened and to prove that it resulted from the defendant's negligence.

If the jury had followed such instructions, they would necessarily have found for the defendant. If they followed the instructions as given by the Trial Court, they would find for the plaintiff.

The erroneous instruction was, therefore, exactly that prejudicial; *i. e.*, the difference between deciding the case one way and deciding it the other — — the difference between winning the case and losing it.

In support of the suggestion that after proving that its couplers were not defective, defendant was entitled

to have the jury understand that the burden of explaining how the accident happened and showing negligence in the Railroad, was on the plaintiff. We refer the court to the decision in the case of—

Patton vs. T. & P. Railroad, 179 U. S. 658, where the Court said:

> Page 659. "The facts were that plaintiff was a fireman on a passenger train of the defendant running from El Paso to Toyah and return, some three or four hours. One of these trips had been made, and while the engine on which he was fireman was being moved in the Railroad yards, at El Paso, plaintiff attempted to step off the engine, and in doing so, the step turned and he fell so far under the engine that the wheels passed over his right hand, crushing it so that amputation became necessary * * * * "

> Page 663. "Upon these facts, we make these observations.—First, that while in the case of a passenger the fact of an accident carries with it, a presumption which in the absence of some explanation or proof to the contrary, is sufficient to sustain a verdict against him. As there is prima facie a breach of his contract to carry safely. (*Stokes vs. Saltonstall*, 13 *Peters*, 181; *R. R. Co. vs. Pollard*, 22 *Wallace*, 341; *Gleason vs. V. M. R. R. Co.*, 140 *U. S.*, 435.) a different rule obtains as to an employee. The fact of accident carries with it no presumption of negligence on the part of the employer, and it is an affirmative fact for the injured employee to establish that the employer has been guilty of negligence. *T. & P. Ry. Co. vs. Barrett*, 166 *U. S.*, 617. Second, that in the latter case, it is not sufficient for the employee to show that the employer may have been guilty of negligence, the evidence must point to the fact that he was. And where the testimony leaves the matter uncertain and shows that any one of a half dozen

> things may have brought about the injury, for some of which the employer is responsible, and for some of which he is not, **IT IS NOT FOR THE JURY TO GUESS BETWEEN THESE HALF DOZEN CASES AND FIND THAT THE NEGLIGENCE OF THE EMPLOYER WAS THE REAL CAUSE,** when there is no satisfactory foundation in the testimony for that conclusion." If the employee is unable to adduce sufficient evidence to show negligence on the part of the employer, it is only one of the many cases in which the plaintiff fails in his testimony, and no mere sympathy for the unfortunate victim of an accident justifies any departure from settled rules and pratices resting upon all plaintiffs, etc."

As against this, the plaintiff cites the case of Minneapolis & St. L. Railroad Company vs. Gotschall, 244 U. S., 66. By reference to that case, the court will be reminded that in it the facts were as follows:

Gotschall, a minor, was an interstate freight brakeman. His train was in motion and he was walking the tops of the cars, when the train separated, because of the opening of a coupler on one of the cars, resulting in a jerk which threw Gotschall from the train and killed him. This Court said, page 67.

> " 'The jury, under instruction of the court, was permitted to infer negligence on the part of the Company from the fact that the coupler failed to perform its function, there being no other proof of negligence,' and then, after analyzing the situation, held that since it affirmatively appeared that the coupler failed to perform its functions, it was proper, and, since the Safety Appliance Act imposes the absolute duty on Railroads to furnish automatic couplers between cars, it was reasonable, to suppose that the Railroad had not complied with its duty and had not supplied proper couplers."

The Gotschall case differs from the case at bar in two essential particulars. In the first place, the coupling in this case was not a coupling between two cars at all. It was the coupling between the locomotive and its tender and this court has expressly held that the Safety Appliance Act is not applicable to the coupling between engine and tender.

> 231 *U. S.*, 675; *Pennell vs. Pennsylvania and Reading R. R. Co.*

In this case plaintiff was injured because while an interstate train was moving, the engine and tender parted. The Trial Court on these facts, instructed a verdict for the defendant, which instruction came here for review. This court, speaking through Mr. Justice McKenna, squarely held that the Safety Applicance Act did not apply to the coupling between the engine and tender and affirmed the judgment. As the coupling here in dispute is the same coupling, namely, that between the engine and the tender, the case cited would seem to be directly applicable.

In the second place, **THE RAILROAD COMPANY IN THIS CASE AFFIRMATIVELY SHOWED THAT THE ACCIDENT WAS NOT DUE TO THE FAULT OF THE COUPLER.** The coupler broke, it is true, but not because of any defect in it; whereas, in the Gotschall case, the record shows that the coupler pulled open and the Railroad Company did not prove that it was free from defect. An inspection of the record of the Gotschall case will show your Honors that the Supreme Court of Minnesota expressly held that there had been no evidence in regard to the Status of the couplers except the evidence of the conductor of the train, and that on cross-examination, he admitted he had not examined one of them at at all.

In the Gotschall case, in the absence of evidence to the contrary, the court held that the jury might be allowed to infer from the fact that the coupler failed to perform its function, that the coupler was defective, but the court was very far from saying that if the Railroad Company had affirmatively proven that the coupler was free from defect, the jury could have been allowed to infer that it was defective.

In this case the plaintiff comes into court and proves the accident. The Railroad comes in and proves that the coupling device was free from defect. Both sides rest. Under these circumstances, if the burden was on the plaintiff to prove defendant's negligence, defendant was entitled to a judgment. If, on the other hand, the burden was on defendant to prove itself free from negligence, plaintiff was entitled to a judgment. Under these circumstances, the court charged the jury that the Mississippi prima facie statute was applicable and that, therefore, the burden was on the defendant to prove itself free from negligence. It is now admitted that under the decision of this court in the Cheney Harris case, 247 U. S., this charge was erroneous, but it is contended that it was not prejudicial. We find it difficult to imagine how a more prejudicial charge could have been formulated.

The Boiler Inspection Act

The plaintiff further contends that the amendment of March 4th, 1915, to the Boiler Inspection Act is applicable, and renders the charge complained of innocuous.

All that has been said above as to the Safety Appliance Act is equally applicable to the Boiler Inspection Act. In this case it was, we submit, affirmatively proven that the coupler was of approved pattern and was in no wise defective; hence, under the unbroken line of juris-

prudence in this court, no presumption of negligence could arise from the accident, but the burden remained on the plaintiff to prove affirmatively that the defendant Railroad Company was negligent.

Moreover, it is to be noted that the Boiler Inspection Act differs radically from the Safety Appliance Act in this, that under the Safety Appliance Act there is an absolute hidebound duty to use safe couplers; whereas, the Boiler Act specifically provides for a system of inspection by U. S. Inspectors, and specifically and in words, gives the carrier the right to use appliances inspected and approved by them. Thus, section 6 of the Boiler Inspection Act first imposes upon the U. S. Inspector the duty "to see * * that carriers repair the defects which such inspections disclose, before the boiler or boilers and all appurtenances appertaining thereto are again put into service."

After providing for appeals from unfavorable reports of sub-inspectors, the Section then proceeds: "If, upon such examination, the boiler is found in serviceable condition, the Chief Inspector shall immediately notify the carrier, in writing; **WHEREUPON SUCH BOILER MAY BE PUT INTO SERVICE WITHOUT FURTHER DELAY.** Surely it would not be contended that if a boiler or other part of a locomotive was thus put into service on the express approval of a U. S. Inspector, a presumption could thereafter arise to the effect that Railroad Company was negligent in using such boiler or other locomotive part.

In the present instance the record affirmatively shows, pages 96-7-8, that the inspections then in vogue were made and the engine and tender found free from defect. On the trial of the case defendant proved them to be free from defect. Surely under these circumstances the bur-

den was on the plaintiff to show that the Railroad Company was negligent and the charge to the jury relieving the plaintiff of that burden was erroneous. All of which is respectfully submitted.

J. BLANC MONROE,
MONTE M. LEMANN,
ALBERT S. BOZEMAN,
Attorneys for Defendant in Error.

L. E. JEFFRIES,
S. R. PRINCE,
H. O'B. COOPER,
of Counsel.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1918.

No. 242

THE NEW ORLEANS & NORTHEASTERN RAILROAD COMPANY AND THE UNITED STATES FIDELITY & GUARANTY COMPANY,
Plaintiffs in Error, Petitioners for Certiorari,

versus

JOE SCARLET,
Defendant in Error.

In Error and in Certiorari to the Supreme Court of the State of Mississippi.

Statement of the Case and Brief for Plaintiffs in Error.

J. BLANC MONROE,
MONTE M. LEMANN,
ALBERT S. BOZEMAN,
Attorneys for New Orleans & Northeastern R. R. Co.

L. E. JEFFRIES,
S. R. PRINCE,
H. O'B. COOPER,
Of Counsel.

E. P. Andrus Ptg. Co., 516 Natchez St., New Orleans, La.

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SYLLABUS.

(1) The liability of interstate carriers to their interstate employees is a national, not a local question. Public policy requires, and the Federal Employers' Liability Act insists that that liability shall be uniform throughout the length and breadth of the land.

(2) No State statute will be permitted to destroy the uniformity thus provided, or to impose upon interstate

carriers a heavier burden than is imposed upon them by the Federal Act.

(3) The Federal Employers' Liability Act imposes liability on the carrier only in case of negligence which negligence must be proven by plaintiff.

(4) The Mississippi *prima facie* statute imposes liability on the carrier even when not negligent.

(5) To apply that Mississippi statute to an interstate carrier is to deprive that carrier of a substantive right, given it by the Act of Congress.

(6) If that statute be applicable to a case arising under the Federal act, then that statute unduly burdens interstate commerce, destroys uniformity of liability, violates the substantive constitutional rights of the defendant carrier, and is null and void.

May It Please The Court:

This case has already been briefed on the application for *certiorai*, and this brief is filed from a superabundance of caution and in order to present to the Court the cases decided since the former brief was filed.

Plaintiff, Joe Scarlet, alleges (Record, page 3) that he was a locomotive fireman running between New Orleans, La., and Meridian, Miss.; that, while on this interstate run, he was injured and, because of said injury, is entitled to damages; that his train was "engaged in interstate commerce", and that "the duties of said master railroad company were then and there fixed by an Act of Congress of the United States enacted for the protection of life and

limb of servants of interstate carriers, and under which said Act of Congress the defendant Railroad Company is made liable to its servants employed by it in interstate commerce for damages" caused by negligence or defective appliances.

Plaintiff, therefore, was plainly suing under the Federal Employers' Liability Act.

The case came on for trial before a Mississippi jury. Plaintiff asked the trial Judge to instruct the jury that the Mississippi *Prima Facie* Statute, which is set out in full on page 3 of our original brief, was applicable, and that, in the absence of any affirmative proof of negligence, the jury might find the defendant liable.

The defendant asked the Court to instruct the jury specifically that the Mississippi statute was not applicable to this proceeding brounght under Federal law.

The Court granted the plaintiff's request and denied the defendant's, charging the jury as follows (Record, page 110, No. 1):

> "The Court instructs the jury for the plaintiff in this case, that what is known as the *Prima Facie* Statute of Mississippi is a rule of evidence and is admissible and binding even though the plaintiff's right of action is circumscribed and controlled by the Act of Congress known as the Employers' Liability Act, and that proof of injury from the running of defendant's engine and cars is *prima facie* evidence of negligence on the part of the defendant, and, in order to meet same, the defendant must show facts and circumstances surrounding the occurrence and thus show to the jury that there was no negligence

on its part, and that this presumption is not met by conjecture and surmise."

The instructions which the defendant requested and which the Court refused to give were as follows (Record page 113, No. 6):

> "The Court instructs the jury for the defendant that, this being a suit under the Federal Employers' Liability Act, the plaintiff is not entitled to the benefit of the Mississippi *Prima Facie* Statute, and that the mere fact that the injury was caused by a running train is not *prima facie* evidence of negligence on the part of the Railroad Company in this case."

The case went to the jury on those and other instructions and the jury promptly found a verdict against the defendant for $2500.

Defendant applied to the Supreme Court of Mississippi which tribunal affirmed the lower Court and held squarely that the Mississippi *Prima Facie* Statute was properly applied and charged to the jury. See Record page 121, where the Supreme Court of Mississippi is quoted as saying:

> "Section 1985, Code 1906, amended by Chapter 215, Laws of 1912, as construed in *Railroad Company v. Thornhill*, 106 *Miss.*, 387, deals not with a substantial right but only with a rule of evidence. *Lumber Co. v. Pearce*, 106 *Miss.*, 672; 235 *U. S. Sup. Ct. Rep.*, 380 (59 *L. Ed.*, 279); and since the *lex fori* govern in all matters of procedure, the Court below committed no error in charging the jury in accordance therewith."

In fairness to the Supreme Court of Mississippi be it said that this decision was handed down before the decision of this Court in the case of *New Orleans & Northeastern Railroad Co. v. Chaney Harris*, 247 *U. S.*, ——, decided June 3, 1918; and that, since the decision in the *Harris case*, the Supreme Court of Mississippi has again had the question before it in the case of *New Orleans & Northeastern Railroad Co. v. Hanna*, 78 *So.*, 953, and has followed the decision of this Court in the *Harris case*.

The defendant Railroad Company, because of doubt as to the proper procedure, has, in the present instance, brought the decision of the Supreme Court of Mississippi, of which it complains, to this tribunal for review in two ways: first, by writ of error, and, second, by *certiorari*. The *certiorari* was by the Court referred to the writ for hearing, and both are now before the Court.

Be it said in regard to the procedure by writ of error that, since the Mississippi *Prima Facie* Statute, as construed by the Supreme Court of Mississippi, was, at the time the writ of error was sued out, made applicable to cases arising under the Federal Employers' Liability Act, said statute so construed was a State interference with and a burden upon commerce, and hence unconstitutional.

It would be of service to the profession were the Court to decide which method of review is the correct one, as such a decision would obviate the future duplication of procedure, which has been resorted to in this case.

I.

ARGUMENT.

As appears from the above statement, this case presents squarely the question whether the Mississippi *Prima Facie* Statute is applicable to cases arising under the Federal Employers' Liability Act.

That identical question was presented to this Court in the case of *New Orleans & Northeastern Railroad Co. v. Chaney Harris*, 247 *U. S.*, ——; 38 *Sup. Ct.*, 535, decided June 3, 1918, and it was there decided that the statute in question was NOT applicalble to such cases, and that a charge to the jury that it was applicable was error entitling the defendant Railroad Company to reversal and remand. This Court, speaking through Mr. Justice McReynolds in the *Chaney Harris case*, said:

> "The so-called '*Prima Facie* Act' of Mississippi, set out below, provides that in actions against railroads for damages, proof of injury inflicted by an engine propelled by steam shall be *prima facie* evidence of negligence. Relying upon and undertaking to apply this statute, the trial Court gave the quoted instructions; and in so doing, we think, committed error.
>
> "The Federal Courts have long held that where suit is brought against a railroad for injuries to an employee resulting from its negligence, such negligence is an affirmative fact which plaintiff must establish. *Nitro-glycerine case* (*Parrott v. Wells*) 15 *Wall.*, 524, 537; 21 *L. Ed.*, 206, 211; *Patton v. Texas & P. R. Co.*, 179 *U. S.*, 658, 663; 45 *L. Ed.*, 361, 364; 21 *Sup. Ct. Rep.*, 275; *Looney v. Metropol-*

> *itan R. Co.*, 200 *U. S.*, 480, 487; 50 *L. Ed.*, 564, 568; 26 *Sup. Ct. Rep.*, 303; 19 *Am. Neg. Rep.*, 627; *Southern Railway—Carolina Division v. Bennett*, 233 *U. S.*, 80, 85; 58 *L. Ed.*, 860, 862; 34 *Sup. Ct. Rep.*, 566; 10 *N. C. C. A.*, 853. In proceedings brought under the Federal Employers' Liability Act, rights and obligations depend upon it and applicable principles of common law as interpreted and applied in Federal Courts; and negligence is essential to recovery. *Seaboard Air Line R. Co. v. Horton*, 233 *U. S.*, 492, 501, 502; 58 *L. Ed.*, 1062, 1068, 1069; *L. R. A.*, 1915C, 1; 34 *Sup. Ct. Rep.*, 635; *Ann. Cas.*, 1915*B*, 475; 8 *N. C. C. A.*, 834; *Southern R. Co. v. Gray*, 241 *U. S.*, 333, 339; 60 *L. Ed.*, 1030, 1034; 36 *Sup. Ct. Rep.*, 558; *New York C. R. Co. v. Winfield*, 244 *U. S.*, 147, 150; 61 *L. Ed.*, 1045, 1048; *L. R. A.* 1918*C*, 439; 37 *Sup. Ct. Rep.*, 546; *Ann. Cas.*, 1917*D*, 1139; *Erie R. Co. v. Winfield*, 244 *U. S.*, 170, 172; 61 *L. Ed.*, 1057, 1064; 37 *Sup. Ct. Rep.*, 556. These established principles and our holding in *Central Vermont R. Co. v. White*, 238 *U. S.*, 507, 511 ,512, 59 *L. Ed.*, 1435, 1436, 1437; 35 *Sup. Ct. Rep.*, 865; *Ann. Cas.*, 1916*B*, 252; 9 *N. C. C. A.*, 265; we think, make it clear that the question of burden of proof is a matter of substance, and not subject to control by laws of the several states."

After the decision in the *Harris case*, the same question was again presented to the Supreme Court of Mississippi in the case of New Orleans Northeastern Railroad Co. *v. Hanna*, 78 *So.*, 953, and that Court said:

> "This is admittedly under the Federal Employers' Liability Act, and, being so, this case is ruled by the very recent opinion of the Supreme Court of the

United States in *N. O. & N. E. R. R. Co.* and *United States Fidelity & Guaranty Co. v. Chaney Harris*, decided June 3, 1918, 246 *U. S.*, ——, 38 *Sup. Ct.*, 535, 62 *L. Ed.*, ——, a certified copy of the opinion of which is before us. The Court, speaking through Mr. Justice McReynolds, holds that:

"'The Fedearl Courts have long held that where suit is brought against a railroad for damages to an employee, resulting from its negligence, such negligence is an affirmative fact which plaintiff must establish, and in proceedings brought under the Federal Employers' Liability Act, rights and obligations depend upon it and applicable principles of common law, as interpreted and applied in Federal Courts, and negligence is essential to recovery; * * * that the question of burden of proof is a matter of substance and not subject to control by laws of the several states.'

"Under this decision, our *Prima Facie* Statute has no application to suits brought under the Federal Employers' Liability Act. It necessarily follows that the granting to the plaintiff in this case of instruction No. 2, and the refusal to grant to defendant the instructions mentioned, was error necessitating a reversal of the judgment rendered by the learned Circuit Court. The issue was not properly submitted to the jury."

The present case presents again the same question in regard to the same statute. Since this Court has already passed upon the identical question in the *Harris case*, and the Supreme Court of Misisssippi has, in the *Hanna case*, acquiesced in the doctrine thus laid down, it would seem inevitably to follow that the decision of the Supreme Court

of Mississippi, which is at variance with its own decision in the *Hanna case* and at variance with the decision of this Court in the *Harris case*, must be reversed. There is, therefore, nothing left to discuss in this case, and we shall with the foregoing statement, simply content ourselves with re-stating the propositions in the *Harris case*, appending to each proposition a citation of the authorities upon which it is founded. Those propositions were and are as follows:

(a)

In enacting the Employers' Liability Act, Congress intended to establish a uniform rule which should govern the liability of interstate carriers for damages to interstate employees.

244 *U. S.*, 147, *N. Y. C. R. R. Co. v. Winfield.* See especially page 149.

244 *U. S.*, 172, *Erie R. R. Co. v. Winfield;* 233 *U. S.*, 57.

Second Employers' Liability Case, 223 U. S. 1.

244 *U. S.*, 360, *N. Y. C. R. R. Co. v. Tonsellito.*

(b)

Under the Federal Employers' Liability Act, negligence on the part of the carrier is an essential prerequisite to recovery.

247 *U. S.*, —, *N. O. & N. E. R. R. Co. v. Harris.*

241 *U. S.*, 338, *Southern R. Co. v. Gray.*

244 *U. S.*, 150, *N. Y. C. R. R. Co. v. Winfield.*

244 *U. S.*, 172, *Erie R. R. Co. v. Winfield.*

(c)

Federal Courts have always imposed on the employee the burden of proving the carrier's negligence.

Elliott on Railroads, Section 1309.

179 *U. S.*, 658, *Patton v. T. & P. Ry. Co.*

15 *Wallace*, 524, *the Nitro-Glycerine Case.*

233 *U. S.*, 80, *Southern Ry. Co. v. Bennett.*

Ritchie's Federal Employers' Liability Act, Sec. 148, *page* 304.

218 *Fed.*, 753, *In re Federal Biscuit Co.*

232 *Fed.*, 353, *Canadian Pacific Ry. Co. v. Thompson.*

(d)

The Mississippi *Prima Facie* Statute imposes liability regardless of negligence, and, if applied to actions under the Federal Employers' Act, deprives the defendant railroads of a subtsantive right, and burdens interstate commerce.

The first case to which we desire to refer under this heading is *Norfolk Southern R. R. Co. v. Ferebee*, 238 *U. S.*, 269. In that case the question at issue was the application in a suit brought under the Federal Employer's Liability Act of a statute of North Carolina regulating practice upon new trials. It was contended in that case, as in this case, that the State statute related purely to remedy and to procedure, and that, therefore,, it was applicable to suits under Federal Act. This Court, however, denied this contention, laying down the broad rule in this general statement:

> "A substantive right or defense arising under the Federal law cannot be lessened or destroyed by a *State rule of practice.*" (Italics ours.)

This general statement is in itself sufficient to dispose of the present case; but the Court has also directly applied this statement to a case substantially on all-fours with the present case.

See *Central Vermont Railway Company v. White*, 238 *U. S.*, 507. In that case the plaintiff, the administrator of a deceased employee of the defendant, sued the defendant railway company in a State Court of Vermont under the Federal Employers' Liability Act for the benefit of the decedent's widow and children, claiming damages for his death, occurring in its service. White, the deceased employee, was killed in a rear-end collision and it was determined that the defendant railroad company was guilty of negligence proximately causing the death. It was contended, however, by the railway company that White, the decedent, was himself guilty of contributory negligence and that the recovery should be diminished under the Employers' Liability Act because thereof; and the question arose and was a determinative one upon which party rested the burden of proof touching contributory negligence.

Under the laws of Vermont, as construed by its Supreme Court, in a long series of decisions, the burden in cases of this kind rested on plaintiff, not only to show that the defendant had been guilty of negligence, but, as well, that the person for whose death the suit was brought was not guilty of contributory negligence. The trial Court refused to hold that the Vermont rule, a rule of evidence, was applicable to

the case, but did hold that the Employers' Liability Act was to be administered according to the general rule on the subject of the burden of proof established by the Federal Courts, placing the burden of proof on the defendant to show that the person for whose death the suit was brought was guilty of contributory negligence. This ruling was approved by the Supreme Court of Vermont, 87 *Vt.*, 330, and the case was appealed by the railroad company to this Court. This Court, Mr. Justice Lamar delivering the unanimous opinion of the judges, said:

> "In this Court the argument was devoted principally to a discussion of this ruling—counsel for the railroad company earnestly insisting that 'the *lex fori* must determine all questions of evidence, including that of the burden of proof. *Wharton on Conflict of Laws* (3rd. *Ed.*),*Sec.*, 478b'. It was argued that there is nothing in the Federal statutes indicating an intent to change the State rule as to the burden of proof, and it is claimed that because of the Court's mistaken construction of the Federal Act the railway company has been deprived of a right to which it is entitled.
>
> There can, of course, be no doubt of the general principle that matters respecting the remedy—such as the form of action, sufficiency of the pleadings, rules of evidence, and the statute of limitations depend upon the law of the place where the suit is brought. *McNeil v. Holbrook*, 12 *Pet.*, 89. But matters of substance and procedure must not be confounded because they happen to have the same name. For example, the time within which a suit is to be brought is treated as pertaining to the remedy. But this is not so if, by the statute giving the cause of

action, the lapse of time not only bars the remedy but destroys the liability. *Philips v. Grand Trunk Ry.*, 236 *U. S.*, 622; *Boyd v. Clark*, 8 *Fed. Rep.*, 849; *Hollowell v. Horwick*, 14 *Massachusetts*, 188; *Cooper v. Lyons*, 77 *Tennessee*, 597 (2); *Newcomb v. Steamboat Co.*, 3 *Iowa (G. Green)*, 295. In that class of cases the law of the jurisdiction, creating the cause of action and fixing the time within which it must be asserted, would control even where the suit was brought in the Courts of a State which gave a longer period within which to sue. So, too, as to the burden of proof. As long as the question involves a mere matter of procedure as to the time when and the order in which evidence should be submtited the State Court can, in those instances, follow their own practice even in the trial of suits arising under the Federal law.

"But it is a misnomer to say that the question as to the burden of proof as to contributory negligence is a mere matter of State procedure. For, in Vermont, and in a few other States, proof of plaintiff's freedom from fault is a part of the very substance of his case. He must not only satisfy the jury (1) that he was injured by the negligence of the defendant, but he must go further, and, as a condition of his right to recover, must also show (2) that he was not guilty. Plaintiff is as much under the necessity of proving one of these facts as the other; and as to neither can it be said that the burden is imposed by a rule of procedure, since it arises out of the general obligation imposed upon every plaintiff, to establish all of the facts necessary to make out his cause of action. But the United States Courts have uniformly held that as a matter of general law the burden of proving contributory negligence is on the defendant. The

Federal Courts have enforced that principle even in trial in States which hold that the burden is on the plaintiff. *Railroad v. Gladmon*, 15 *Wall.*, 401 (1), 407-407; *Hough v. Railway Co.*, 100 *U. S.*, 225; *Inland, etc., Co. v. Tolson*, 139 *U. S.* 551 (4), 557; *Washington etc. R. R. v. Harmon*, 147 *U. S.*, 581; *Hemingway v. Ill. Cent. R. R.*, 114 *Fed. Rep.*, 843. Congress in passing the Federal Employers' Liability Act evidently intended that the Federal statute should be construed in the light of these and other decisions of the Federal Courts. Such construction of the statute was, in effect, approved in *Sea Board Air Line v. Moore*, 228 *U. S.*, 434. There was therefore **no error** in failing to enforce what the defenant calls the Vermont rule of procedure as to the burden of proof.

The only difference between the *White case* and the one at bar is this: In the *White case* the rule as to the burden of proof was one established by the decisions of the Supreme Court of Vermont. In the present case the State rule of evidence is a statutory one. This difference, if material, is favorable to the present case. The Federal Employers' Liability Act, seeking uniform administration throughout the land, displaced State statutory enactments out of harmony with its purposes quite as much as it displaced the inharmonious laws of the State as determined by its highest judicial tribunals.

See also *N. O. & N. E. R. R. Co. v. Harris*, 247 *U. S.*, —, quoted *supra*:

N. O. & N. E. R. R. Co. v. Hanna, 78 *So.*, 953.
Atlantic Coast Line R. R. Co. v. Burnette, 239 *U. S.*, 199.

C. R. I. & P. Ry. Co. v. Devine, 239 *U. S.*, 53.
Atlantic Coast Line R. R. Co. v. Mims, Admx., 242 *U. S.*, 536.
N. Y. Central R. R. Co. v. Winfield, 244 *U. S.*, 147.
Southern Ry. Co. v. Gray, 241 *U. S.*, 338.
L. & N. R. R. Co. v. Kemp, 140 *Ga.*, 657, 79 *S. E.*, 558.
L. & N. R. R. Co. v. Rhoda, 74 *So.*, 19, — *Fla.*, —.

For these reasons, we respectfully ask a reversal of the judgment of the Supreme Court of Mississippi brought under review by the writ of error and by the *certiorari* in this case.

Respectfully submitted,

J. BLANC MONROE,
MONTE M. LEMANN,
ALBERT S. BOZEMAN,
Attorneys for New Orleans & Northeastern R. R. Co.

L. E. JEFFRIES,
S. R. PRINCE,
H. O'B. COOPER,
Of Counsel.

Office Supreme Court, U. S.
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CLERK

United States Supreme Court.

No. 242

NEW ORLEANS AND NORTHEASTERN RAILROAD COMPANY, PETITIONER,

versus

JOE SCARLET.

Petition for a Writ of Certiorari to the Supreme Court of the State of Mississippi.

BRIEF FOR RESPONDENT.

THOMAS G. FEWELL,
For Respondent.

C. B. CAMERON,
Of Counsel.

United States Supreme Court.

---

*No.*_____

NEW ORLEANS AND NORTHEASTERN RAILROAD COMPANY, PETITIONER,

versus

JOE SCARLET.

Petition for a Writ of Certiorari to the Supreme Court of the State of Mississippi.

BRIEF FOR RESPONDENT.

STATEMENT OF FACTS BY APPELLEE.

The Appellee, a young white man, after having served the appellant, his master for about five years, faithfully and faultlessly as a locomotive fireman was, while engaged in the service of his master, and without fault on his part, painfully and permanently injured on the night of September 14th or morning of September 15th, 1915, by the engine and tender of the engine he was firing pulling apart and dropping Appellee

cnto the railroad track, where he was pounded in the back by the air hose attached to the tender.

The whole rigging between the engine and tank was violently severed, the king pin broken, the chains broken, and the draft bolts torn out of the beams.

The evidence shows that at least a portion of the king pin was preserved but the Court and the jury were not given a peep at same.

The testimony further showed that the capacity of these engines was from nine hundred to ten hundred tons single.

That the engine itself was approximately seventy-three tens. That the two engines had a train of about 1500 tons.

That the king pin and coupling gear between the engine and tender of No. 260 had never been reinforced or strengthened when it was put into double-header service.

The proof shows that when starting such a train the front engine takes up the slack, starts the train and then the second engine lends its power to the movement of the train.

The physical facts and the evidence of the witnesses demonstrated beyond any shadow of a doubt that the attempt of the front engineer to start the train, either with a jerk or smoothly, with the equipment as it was and with a king pin that was defective and with the chains and couplings insufficient to move the tonnage (1573 tons) under the condition then existing was the cause of Scarlett's injury.

THE LAW OF THE CASE.

Our contention is that under the law as it was at the time of the injury, the plaintiff was entitled to a peremptory instruction on the liability.

Under the Boiler Inspection Act—36 U. S. Statutes at Large 913, section 2.

Made it unlawful to operate, etc., unless the boiler of said locomotive and appurtenances thereof are in proper condition and safe to operate in the service to which the same is put—"That the same may be employed in the active service of such carrier moving traffic without unnecessary peril to life or limb," etc.

Further providing for appointment of inspectors, etc.

This Act was approved by the President February 17th, 1911, and went into effect July 1st, 1911. This Act is one of the so called Safety Appliance Acts.

Thereafter on March 4th, 1915, the Congress of the United States passed what is known as the Amendatory Act under the Boiler Inspection Act.

By which Act it was provided that Sec. two of the Boiler Inspection Act *should apply to and include the entire locomotive and tender and all parts and appurtenances thereof.*

This Amendatory Act also provided for Inspection, etc.

By section four of this Act it is provided that it take effect six months after its passage, except as otherwise therein provided, etc.

So we say that the engineer, tender, appurtenances, and all parts of the locomotive became and were under said Acts—parts of the Safety Appliance Acts of Congress—and that same went into effect September 4th, 1915, or six months after March 4th, 1915, and was therefore in full force and effect at the time of Scarlett's injury.

If this be true, and it cannot be otherwise, the question of inspection or due care or negligence in these respects have no sort of application to the company's liability.

See St. L. & I. M. & Southern Railroad Co. 210 U. S., 281—52 Law. Ed., 1061. T. & P. Ry. v. Rigsby, 60 L. Edd., 874, and others

But the Liability is absolute.

We will not cite the numerous authorities of the Supreme Court of Mississippi wherein it has been held that our Statute was merely a Rule of Evidence. Because this is not disputed by Counsel for appellant.

And this construction of our Statute has been held constitutional by the Supreme Court of the United States in what is known as M. J. & K. C. R. R. Co. v. Turnipseed, 219 U. S., 35 L. Edd. 578. Easterling & Co. v. Pierce, 235 U. S., 59 L. Edd. 279.

The amendment of 1910 to section 6 of the Employers Liability Act expressly provides as follows:

"The jurisdiction of the Courts of the United States under this act shall be concurrent with that of the Courts of the several States."

This amendment was intended to confer full jurisdiction upon the State Courts according to the best text writers and was an indication that prior to its adoption the state court had no jurisdiction.

The Statute expressly declared by the amendment of 1910 that the action must be brought "In a Circuit (now District) Court of the United States.

1st. In the district of the residence of the defendant.

2nd. Or in which the case of action arose.

3rd. Or in which the defendant shall be doing business at the time of the commencement of the action.

But when the jurisdiction was conferred upon the State Courts by the amendment, no venue was fixed and Mr. Thorn-

ton in his excellent work at page 289 uses the following language in the text:

"Here resort must be made to the State Statutes."

And this same author in a note at the bottom of this page, says:

"No case on this exact point has come to my notice, and I think my text states the true rule. When Congress was stating in section 6 where an action might be brought, it had in mind the bringing of the action in a Federal Court, and not in a State Court, when it gave the right to bring the action in a State Court, it at the same time not only adopted the State procedure, but also the Law relating to the venue."

Further this author at page 306 lays down the law to be that the court may permit an amendment of the complaint to fit the evidence at its close but this depends upon the local state practice. See 199 Thornton—Local State Practice Controls.

The Revised Statutes of the United States Par. 721, Compiled Statutes Par. 1538 provide as follows: Under the heading Laws of the States Rules of Decision:

"The Laws of the several States, except where the constitution, treaties, or Statutes of the United States *otherwise require* shall be regarded as Rules of Decision in trials at Common Law, in the Courts of the United States, in cases where they apply."

The general rule is that the laws of the several States shall be regarded as Rules of Decision in the Courts of the United States in cases in which they apply. "The Judiciary Act requires this and it would be the Law independently of the enactment."

See also Section 1537 of the Compiled Statutes Annotated.

And under these sections the following annotations under Evidence:

The "Law of the several States" with respect to evidence within the meaning of this section apply not only to the Statutes but to the decisions of their highest Court's citing.

Nashua Sav. BL. v. Angol. Am. L. Co. 189 U. S. 228.
Hinds v. Keith (cca) 57 Fed. 10.
Gornelly v. Clark, 134 U. S. 348.
Buscher v. Cheshire R. R. 125 U. S. 583.
Ex Parte Fisk. 113 U. S. 720.
Belding v. Hebard (cca) 103 Fed. 532.
Wright v. Taylor 2 Dill (U. S.) 25.
Stewart v. Morris (cca) 89 Fed. 289.
Berry v. Fletcher 1 Dill (U. S.) 66.
Nelson v. Killingly BK (cca) 69 Fed. 798.
U. S. v. Hall 53 Fed. 352.
U. S. v. Dow Faney (U. S.) 34, etc.

And in the case of U. P. R. R. v. Yates (cca) 79 Fed. 588, the court upheld this general rule but followed the construction of the Common Law as construed by the United States Courts.

And Further:

"Rules of evidence prescribed by the laws of the State are to be observed in the trial of causes, in the Federal Courts sitting within the state, the only exception being provided for by the Statutes of the United States."

Parket v. Moore 111 Fed. 470, and Mutual L. Ins. Co. v. Union Trust Co. 112 U. S. 250, Camden R. R. v. Statson, 177 U. S. 172.

In this last cited case the Supreme Court of the United

States in passing upon the question certified to it from the United States Circuit Court of Appeals Third Circuit.

Held that a state statute authorizing trial court to order a physical examination of injured party was binding upon the Federal Courts in the face of the policy of the United States Courts and in direct conflict with the Botsford case 35 L. Edd. —Sup. Ct. of U. S. page 739. Where it had been held that no such authority existed in the Federal Courts under the Common Law.

It will be noted that the Employer's Liability Act and its amendments are dead silent as to the methods, quantity and quality of proof of negligence.

The state law is applicable, therefore, in determining what is proper proof and sufficient proof. See 199 Thornton.

It was, under this statement of the Rule, held that proof that the injury was caused by defective appliances made out a prima facie case of negligence on the part of the railroad that being the Rule under the State Courts.

Bennett v. Southern Ry. (S. C.) 79 S. E. 710.

And in another case it was said of the Federal Act: "The State of Kentucky, makes the mere proof of the existence of defects in appliances prima facie evidence of negligence, and that having been shown it throws the burden of disproving negligence upon the employer."

South Covington, etc. vs. Finan—153 Ky. 340. (155 S. W. 742).

Rules of State Law as to pleading, evidence and procedure should be conformed to except as modified by the Act.

McAdaw v. Kansas, etc. R. R. 165 S. W. 185.

Fleming v. Norfolk, etc. R. R. 76 S. E. 212.

Louisville, etc. R. R. v. Johnson, Admx. 161 Ky. 824. 171 S. W. 877.

Central Vermont R. R. v. White 238 U. S. 508.
Sec. 164 Roberts Injury to Interstate Emp.

The state law, the Statute Laws of the state should be applied to action in Federal Courts under such pleadings, evidence and burden of same.

163 U. S. 142.
134 U. S. 418.
164 U. S. 403.
101 U. S. 688.
Vol. 2 U. S. Digest, page 1755, et. seq.

The Legislature may determine which party shall have the burden of proof and that any evidence however slight shall make a prima facie case.

Vol. XI. Am. & Eng. Eng. Law, Page 551, Citing—
Wm. Hoffman vs. Quincey, 4 Wall (U. S.) 535.
Maison vs. Halle, 12 Wheat (U. S.) 370.
and a great number of State authorities.

Vol. 10 Ruling Case Law, page 862—

"There can be no doubt respecting the general power of a state to prescribe rules of evidence which shall be observed by its judicial tribunals. It is a matter concerning its internal policy, etc."

Law Governing—There can be no doubt respecting the general power of a state to prescribe the rules of evidence which shall be observed by its judicial tribunals. It is a matter concerning its internal policy over which its legislative department necessarily has authority, limited only by the constitutional guaranties respecting due process of law, vested rights, and the inviolability of contracts.

Bowlin v. Com., 2 Bush (Ky.) 5, 92 Am. Dec. 468; Pennsylvania Co. v. McCann, 54 Ohio. St. 10, 42 N. E. 768, 56 A. S. R. 693, 31 L. R. A. 651.

The rules of evidence pertain to the remedy, and usually are the same whether the cause of action in which they are applied arises within or without the state whose tribunal is investigating the facts in contention between the parties before it. Nor is it material in this respect whether the parties are residents or non-residents of the state. The law of evidence in its ordinary operation is no more affected by one of these considerations than by the other. No extra-territorial effect is given to a statute creating a rule of evidence by the fact that the rule is applied to the trial of a cause of action arising in another state, or to the trial of an action between parties who are non-residents. If the tribunals of a state obtain jurisdiction of the parties and the cause, it will conduct the investigation of the facts in controversy between them according to its own rules of evidence which is, simply, to follow its own laws within its own borders.

Bowlin v. Con., 2 Bush (Ky.) 5, 92 Am. Dec. 468; Pennsylvania Co. v. McCann, 54 Ohio St., 10, 42 N. E. 768, 56 Am. S. R. 695, 31 L. R. A. 651; Heaton v. Eldridge, 56 Ohio St. 87, 46 N. E. 638, 60 A. S. R. 737. 36 L. R. A. 817; Union Cent. L. Ins. Co. v. Pollard, 94 Va. 146, 26 S. E. 421, 64 A. S. R. 715, 36 L. R. A. 271. See also Confliet of Laws, vol. 5, p. 1045.

Sec. 5, R. C. L. p. 863—State Decisions in Federal Courts.—Inasmuch as the law of evidence is part of the law of procedure, it is generally true that the law of the forum determines questions in respect thereof.

It has become well settled that in a suit involving the

title to land the courts of the United States will follow state decisions upon questions of evidence.

Note: 16 Ann. Cas. 568.

Sec. 6. R. C. L. p. 863—Legislative Power to prescribe Rules of Evidence.—The general power of the legislature to prescribe rules of evidence and methods of proof is undoubted. While the power has its constitutional limitations, it is not easy to define precisely what they are. So long as the legislature, in prescribing rules of evidence, in either civil or criminal cases, leaves a party a fair opportunity to make his defense and to submit all the facts to the jury to be weighed by them, upon evidence legitimately bearing upon them, it is difficult to perceive how its acts can be assailed upon constitutional grounds.

Of course the Federal Congress is not authorized to prescribe rules governing the admissibility of evidence in the state courts.

Sec. 7 R. C. L. page 864—Laws making Certain Facts Presumptive Evidence.—Statutes declaring what shall be presumptive or prima facie evidence of any fact have been held by the weight of authority to be constitutional and valid, unqualifiedly in civil cases.

State v. Thomas, 144 Ala. 77, 40 So. 271, 113 A. S. R. 17, 6 Ann. C. S. 744, 2 L. R. A. (N. S.) 1011; Wooten v. State, 24 Fla. 335, 5 So. 39, 1 L. R. A. 819; Chicago, etc., R. Co. v. Jones, 149 Ill. 361, 37 N. E. 247, 41 A. S. R. 278, 24 L. R. A. 141; Meadowcroft v. People, 163 Ill. 56, 45 N. E. 303, 54 A. S. R. 447, 35 L. R. A. 176; State v. Beach, 147 Ind. 74, 46 N. E. 145, 36 L. R. A. 179; Rose v. State, 171 Ind. 662, 87 N. E. 103, 17 Ann. Cas. 228; Jones v. Hickey, 80 Kan. 109, 102 Pac. 247, 133 A. S. R. 190; People v. Cannon, 139 N. Y. 32, 34 N. E. 759, 36 A. S. R. 668 and note. Note: 6 Ann. Cas. 746.

See also Constitutional Law, vol. 6, p. 462. Volume 5, R. C. L. page 1045, Conflict of Laws.

Sec. 136 Vol. 5, R. C. L.—Application of Rule to Question of Evidence.—The weight of authority as well as sound principles of reason, is in accordance with the rule that questions of evidence are governed by the law of the forum, and that such law determines the admissibility, competency, quality and degree of evidence. Whether a witness is competent or not, whether certain matters require to be proved by writing or not, whether certain evidences prove a certain fact or not, are to be determined by the law of the country where the question arises, where the remedy is sought to be enforced, and where the court sits to enforce it. If the law of the forum requires a certain mode of proof, a contract, although valid, cannot be enforced in that jurisdiction without the proof required there. The evidence by which a contract shall be proved is no part of the contract itself, but its admission or rejection becomes a part of the proceeding on the trial, where its competency and sufficiency must be determined. When the required evidence is lacking, the courts must refuse the enforcement of the contract; and it seems clear that a statutory regulation prescribing the mode or measure of proof necessary to maintain an action or defense pertains to the remedy controlling the procedure of the forum in administering the remedy. A statute of the state of the forum in derogation of the rules of evidence as established elsewhere will, for the reasons stated, as to contracts entered into in another state, be obeyed and executed in any action brought to enforce such contract in former states. A federal court is governed, in actions tried by it, by the federal statute governing the admissibility of evidence of transactions with persons since deceased, rather than by the statute of the state in which it is sitting.

In the Zachery Case, 58 L. Edd., Sup. Ct., 591, the Supreme Court upheld the construction of the state courts holding Lessor of Interstate Carrier liable for the negligence of the Lessee to the Lessee's servant and this under the Employer's Liability Act although the Act itself expressly limited the right of action to "every common carrier by railroad while engaged in commerce between—shall be liable in damages to any person suffering injury while he is employed by such carrier, etc."

In the Kearney case, 60 L. Edd., Sup. Ct., 762, the court applied the state statute in construing the "next of kin" clause of the Employers' Liability Act and affirmed a judgment and award of damages to the legitimate children of the same mother (the mother being dead) for the death of an illegitimate child of that mother, the employee killed.

In the case of Minn. St. L. Ry. v. Bombole, 60 L. Edd., Sup. Ct., U. S. 211, and followed by many subsequent decisions on same point.

The Supreme Court of the United States upheld and applied the State Statute making less than 12 juror verdict legal in the face of the Constitution of the United States requiring 12 juror verdict.

The White case relied upon by appellant is not authority for their position, we respectfully submit:

The railroad company undertook to defeat the rights given under the Employers' Liability Act by appealing to a rule of the Connecticut Decisions—not based on any State Statute but purely a rule of decision of the State based upon the common law, and this rule of decision of State court construing the common law was not followed by the Federal Court, but the Federal Court followed its own decisions construing the Common Law Doctrine of contributory negligence and placed the burden upon the defendant to plead and prove contributory

negligence. This decision is manifestly just and right and in no wise upholds the construction placed upon it by the appellant. The very case is cited under the contrary text supra.

If the contention of appellant was true and a different rule of evidence be held to apply in the trial of such cases in a State Court where the Statute fixed the Rule of Evidence in other cases not arising under the Federal Liability Act, the darkest confusion would occur. One day a trial under one Rule of Evidence followed by a trial under entirely different Rules of Evidence—and this would bring about an unheard of condition of affairs.

The only other case cited by Counsel is the case of L. & N. R. R. v. Rhoda (Fla.) 74 So. 19. It appears that this case was before the Supreme Court of Florida on a former appeal, was affirmed by that Court and on Writ of Error—reversed by the Supreme Court of the United States, 59 L. Edd. 1487.

This former decision, 71 So. 369, was partially based upon a statute of the State of Florida, designated in its caption, "3148 Defines the liability of railroads in certain cases"—Judge Whitfield and Judge Taylor strongly dissented from the affirmance in the first decision upon two propositions:

1st. On the question of the damages under the instructions.

2nd. On the applicability of the "Liability Statute" referred to.

The Supreme Court of the United States never referred to the question of applicability of the "Rule of Liability" or "Rule of Evidence" referred to in the second ground of dissenting opinion of the State Court, but reversed the case upon authority of:

Michigan Cent. v. Vreeland, 57 L. Edd. 417.
Am. R. Co. v. Dedrickson, 57 L. Edd. 456.

G. C. & S. F. v. McGinnis, 57 L. Edd. 785.
Garrett v. L. & N. 57 L. Edd. 242.

In the Vreeland case the Supreme Court only passed upon two propositions:

1st. The court held that a statute of the state creating a survival of the right of action when the Liability Act was silent on the subject was in conflict with the Act.

2nd. The measure of damages.

No where did the Supreme Court pass upon the applicability of the State Liability or Rule of Evidence Statute.

In the Dedrickson case the Supreme Court of the United States:

The reversal is based upon the error of State Court in allowing the jury to consider the loss of society and companionship of a son as elements of damages under Employers' Liability Act.

This was the only point decided in the case.

In the McGinnis case, the Supreme Court reversed the case solely because damages were awarded for Mrs. Sanders when she had suffered no pecuniary loss.

In the Garrett case, the questions presented and decided were:

1st. Whether Admrx. could recover under the Act for benefit of estate of deceased.

2nd. Question of pleading under the Act.

This case went up solely on question of pleading and because of defective pleading and counsel having declined to amend same all along the line, although suggested by the several Courts. The Supreme Court affirmed.

We submit that in none of these cases was the question of a Rule of Evidence decided.

Yet when the case gets back to the Supreme Court of Florida, it falls to Judge Whitfield to write the opinion in the case—in which Judges Taylor, Browne, Shackleford and Ellis concur—in which the following language is used:

> "Both the Federal acts and the State (Fla.) Statutes above quoted define the liability of a railroad company in the cases of negligence, etc."

"And holds that the state Statute conflicts with the Federal Act in matters of substance affecting liability" and is therefore superseded.

Of course the State's Courts construction of its own Statutes to the effect that it goes to the substance and is not a mere Rule of Evidence would be conclusive perhaps upon the Supreme Court of the United States—

But the Rhoda decision is properly decided upon the testimony we submit and it was therefore under the construction of the evidence placed upon it by the Supreme Court of Florida, properly decided—

Our Statute is very unlike the Florida Statute supra.

Our Statute comes under the Chapter of Evidences and begins "In all actions against Railroad's proof of the injury inflicted by the running, etc., shall be prima facie Evidence, etc."

We have no serious apprehension but that our State Courts will adhere to its Rulings on our prima facie Statute and continue to construe same as a mere "Rule of Evidence."

In the White case supra, the Supreme Court of the United States expressly said, speaking through Justice Lamar for a solid Court:

"There can, of course, be no doubt of the general prin-

ciple that matters respecting the remedy—such as the form of the action, sufficiency of the pleadings, *Rules of Evidence* and the Statute of Limitations depend upon the Law of the place where the suit was brought."

McNeil v. Holbrook, 12 Pet. 89 (9 L. Ed. Page 1011) etc.

In conclusion we beg to call the Court's attention to the instructions Nos. 3, 4, 5, granted the defendant, by which instructions the jury was told where the burden of proof must preponderate and we earnestly submit that the defendant had his theories most favorably submitted to the jury in all sorts of forms. In fact, the trial court charged the jury that the prima facie Statute must yield to the facts in evidence, etc.

So we say how can the appellant complain of granting of the Prima Facie Instruction.

All of the instructions are taken together and taking all instructions together the appellant is most favorably treated, in fact, too favorably treated.

The case of Norfolk S. Ry. vs. Ferribee 238 Vs. 270, is no authority for Petitioner in this case. In that case the Supreme Court affirmed the State Supreme Court when judgment had been rendered on a former reversal for new trial as to damages only.

The case of Southern Ry. vs. Gray 241 Vs. 333, is no authority for petitioner we submit, for all of the facts were in evidence and under the Mississippi Law the Railroad would have prevailed.

In the case of R. R. vs. Divine, 239 Vs. 53. The State Statute sought to be interposed by the R. R. Company was one fixing a different measure of damages than that of the Federal Act. This case did not touch on the manner or method of proving negligence.

In the case of the Railway vs. Prescott 240 U. S. 632. The court there was passing upon the State Rule of decision, not a statute, and this Rule of decision was in conflict with the Interstate Commerce Act and the Rules and Regulations under same. And is not, I submit, authority for Petitioner.

We therefore respectfully submit that the Petition should be denied.

THOMAS G. FEWELL,
For Respondent.

We hereby acknowledge service of a copy of the foregoing Brief of Respondent and waive any further notice or requirement as to the filing of same.

This September 27th, 1917.

J. BLANC MONROE,
MONTE M. LEMAN,
ALBERT S. BOZEMAN,
Attorneys for Petitioner.

United States Supreme Court.

No. 624

NEW ORLEANS AND NORTHEASTERN RAILROAD COMPANY,
Plaintiff in Error.

versus

JOE SCARLET.

BRIEF FOR DEFENDANT IN ERROR.

STATEMENT OF FACTS BY DEFENDANT IN ERROR.

The Appellee, a young white man, after having served the appellant, his master, for about five years, faithfully and faultlessly as a locomotive fireman, was, while engaged in the service of his master, and without fault on his part, painfully and permanently injured on the night of September 14th or morning of September 15th, 1915, by the engine and tender of the engine he was firing pulling apart and dropping Appellee

onto the railroad track, where he was pounded in the back by the air hose attached to the tender.

The whole rigging between the engine and tank was violently severed, the king pin broken, the chains broken, and the draft bolts torn out of the beams.

The evidence shows that at least a portion of the king pin was preserved but the Court and the jury were not given a peep at same.

The testimony further showed that the capacity of these engines was from nine hundred to ten hundred tons single.

That the engine itself was approximately seventy-three tons. That the two engines had a train of about 1500 tons.

That the king pin and coupling gear between the engine and tender of No. 260 had never been reinforced or strengthened when it was put into double-header service.

The proof shows that when starting such a train the front engine takes up the slack, starts the train and then the second engine lends its power to the movement of the train.

The physical facts and the evidence of the witnesses demonstrated beyond any shadow of a doubt that the attempt of the front engineer to start the train, either with a jerk or smoothly, with the equipment as it was, and with a king pin that was defective and with the chains and couplings insufficient to move the tonnage (1573 tons) under the condition then existing was the cause of Scarlet's injury.

THE LAW OF THE CASE.

Our contention is that under the law as it was at the time of the injury, the plaintiff was entitled to a peremptory instruction on the liability.

Under the Boiler Inspection Act—36 U. S. Statutes at Large 913, section 2.

Made it unlawful to operate, etc., unless the boiler of said locomotive and appurtenances thereof are in proper condition and safe to operate in the service to which the same is put—"That the same may be employed in the active service of such carrier moving traffic without necessary peril to life or limb," etc.

Further providing for appointment of inspectors, etc.

This Act was approved by the President February 17th, 1911, and went into effect July 1st, 1911. This Act is one of the so called Safety Appliance Acts.

Thereafter on March 4th, 1915, the Congress of the United States passed what is known as the Amendatory Act under the Boiler Inspection Act.

By which Act is was provided that Sec. two of the Boiler Inspection Act *should apply to and include the entire locomotive and tender and all parts and appurtenances thereof.*

This Amendatory Act also provided for Inspection, etc.

By section four of this Act it is provided that it take effect six months after its passage, except as otherwise therein provided, etc.

So we say that the engine, tender, appurtenances, and all parts of the locomotive became and were under said Acts—parts of the Safety Appliance Acts of Congress—and that same went into effect September 4th, 1915, or six months after March 4th, 1915, and was therefore in full force and effect at the time of Scarlet's injury.

If this be true, and it cannot be otherwise, the question of inspection or due care or negligence in these respects have no sort of application to the company's liability.

See St. L. & I. M. & Southern Railroad Co. 210 U. S., 281—52 Law Ed., 1061. T. & P. Ry. v. Rigsby, 60 L. Edd., 874, and others.

But the Liability is absolute.

The Liability does not rest upon negligence. And the question of negligence vel non has no place in the case.

It was not necessary for the Defendant in Error to prove negligence. The violation of the safety appliance act and amendment fixed liability whether or not such violation resulted from negligence.

The case of New Orleans & North Eastern R. R. Co. v. Cheney Harris, Admx., No. 276, October term, 1917, decided by this Court June 3rd, 1918, is conclusive as to the applicability of our Prima Facie Statute to actions arising under the Federal Employers' Liability Acts where the right of action is based upon negligence. But I respectfully submit to the Court that the case at Bar is not covered or controlled by the Harris case.

The Harris case depended upon the negligence — and proof of negligence—of the railroad company.

The case at Bar depends upon the condition of the safety appliances—negligence not being essential.

There was no dispute about the breaking of the couplings and pins and chains.

All of the witnesses agreed that the couplings, pins and chains broke and caused the separation of the engine and tender and the consequent injury of the Defendant in Error.

The proof of the happening and injury made out a case of liability as against the Railroad Company, under the Res Ipsa Loquitur Doctrine.

See M. & St. L. R. R. v. Gotschall, Admx., decided May 21st, 1917; reported in 61 Law Edd. 995.

No sufficient inspection of the pin was shown to have been made by the Plaintiff in Error—even if such inspection would have been a defense.

I respectfully submit that this case should be affirmed.

THOS. G. FEWELL,
For Defendant in Error.

Waiver and acceptance of copy of the foregoing Brief this day entered.

This 10th day of June, 1918.

J. BLANC MONROE,
MONTE M. LEMON,
ALBERT S. BOZEMAN,
Attys. for Plaintiff in Error.

NEW ORLEANS & NORTHEASTERN RAILROAD COMPANY ET AL. *v.* SCARLET.

ERROR TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

No. 242. Argued March 18, 1919.—Decided April 21, 1919.

A state law relieving the plaintiff of the burden of proving negligence is constitutionally inapplicable to a case under the Federal Employers' Liability Act. P. 529. *New Orleans & Northeastern R. R. Co.* v. *Harris*, 247 U. S. 367.

Under the Boiler Inspection Act, the mere breaking of a king pin and coupling chains, without other evidence, does not establish, as a matter of law, that they were defective. P. 530.

When the decision of the state court upholds a state statute in conflict with a valid law of the United States, review is by writ of error. *Id.*

115 Mississippi, 285, reversed.

THE case is stated in the opinion.

Mr. J. Blanc Monroe, with whom *Mr. Monte M. Lemann, Mr. Albert S. Bozeman, Mr. L. E. Jeffries, Mr.*

S. R. Prince and *Mr. H. O'B. Cooper* were on the briefs, for plaintiffs in error.

Mr. Thomas G. Fewell, for defendant in error, submitted. *Mr. C. B. Cameron* was on the brief.

MR. JUSTICE BRANDEIS delivered the opinion of the court.

Scarlet was a fireman on the New Orleans & Northeastern Railroad. While engaged in the performance of his duties he was injured by being thrown down between the engine and the tender. The accident was caused by the uncoupling of engine and tender; and this was apparently due to the breaking of the king pin, which fastened the draw bar to the tender, and the breaking of the coupling chains between engine and tender. He brought suit in a state court of Mississippi under the Federal Employers' Liability Act of April 22, 1908, c. 149, 35 Stat. 65, and the Boiler Inspection Act of February 17, 1911, c. 103, 36 Stat. 913, as amended by the Act of March 4, 1915, c. 169, 38 Stat. 1192, and recovered judgment which was affirmed by the Supreme Court of the State. 115 Mississippi, 285. The case comes here by writ of error under § 237 of the Judicial Code, as amended by the Act of September 6, 1916, c. 448, 39 Stat. 726.

The Railroad contends that the Supreme Court of Mississippi erred in sustaining the action of the trial court, which charged the jury that the so-called "Prima Facie Act" of Mississippi (§ 1985 of the Code of 1906, as amended by c. 215, Laws 1912, p. 290) applied, and that it relieved the plaintiff of the burden of proof to establish negligence. Scarlet concedes now that the statute can not constitutionally be applied to suits under the Federal Employers' Liability Act, since this court has so decided in *New Orleans & Northeastern R. R. Co.* v. *Harris*, 247

U. S. 367; and that the judgment must be reversed if the rights of the Railroad were prejudiced by this error. But he contends that the Railroad was not prejudiced, because negligence on its part is not essential to recovery. He insists that the Boiler Inspection Act, as amended, imposes upon the Railroad the absolute duty (compare *St. Louis, Iron Mountain & Southern Ry. Co.* v. *Taylor*, 210 U. S. 281) to have the "locomotive and tender and all parts and appurtenances thereof" in "proper condition and safe to operate;" that the mere breaking of the king pin and coupling chains shows conclusively that they were defective; that the evidence shows conclusively that this was the proximate cause of the injury; and that the plaintiff was therefore entitled, under the federal act, to have the jury peremptorily instructed to render a verdict in his favor. It does not appear that this contention was made before the Supreme Court of the State, and it was apparently not considered by that court. But whether Scarlet is now in a position to avail himself of the contention need not be determined (compare *Yazoo & Mississippi Valley R. R. Co.* v. *Mullins*, decided this day, *post*, 531); for it is clear that the evidence did not establish as a matter of law that the king pin or the chains were defective. At most it presented a question for the jury. Compare *Minneapolis & St. Louis R. R. Co.* v. *Gotschall*, 244 U. S. 66. We cannot say, therefore, that the Railroad was not prejudiced by the error of the trial court in instructing the jury that the "Prima Facie Act" was applicable.

The conflict of a state statute with a valid law of the United States being involved and the decision having been in favor of the validity of the statute, the case is properly here on a writ of error; and the petition for a writ of certiorari is denied.

Reversed.